Supreme Court, U. S.
FILED
APR 29 1980
MICHAEL RODAK, JR. CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1711

MIDDLESEX COUNTY SEWERAGE AUTHORITY, PASSAIC VALLEY SEWERAGE COMMISSIONERS, MIDDLETOWN SEWERAGE AUTHORITY, BERGEN COUNTY SEWER AUTHORITY and THE LINDEN ROSELLE SEWERAGE AUTHORITY,

Petitioners,

v.

NATIONAL SEA CLAMMERS ASSOCIATION, GOSTA LOVGREN, CITY OF NEW YORK, HONORABLE ABRAHAM BEAME, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RUSSELL E. TRAIN, individually and as ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES ARMY CORPS OF ENGINEERS, MARTIN R. HOFFMANN, individually and as SECRETARY OF THE UNITED STATES DEPARTMENT OF THE ARMY, NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION, OGDEN R. REID, individually and as COMMISSIONER OF THE NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, DAVID J. BARDIN, individually and as COMMISSIONER OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, WEST LONG BEACH SEWER DISTRICT, COUNTY OF WESTCHESER, DEPT. OF ENVIRONMENTAL FAC., CITY OF LONG BEACH AND CITY OF GLEN COVE and THE JOINT MEETING OF ESSEX AND UNION COUNTIES,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WILENTZ, GOLDMAN & SPITZER,
A Professional Corporation,
Attorneys,
FRANCIS X. JOURNICK,
MARVIN J. BRAUTH,
Of Counsel.

MILTON B. CONFORD,
Counsel for Petitioner, Middlesex County Sewerage Authority,
900 Route 9,
Woodbridge, New Jersey 07095.
(201) 636-8000

(*Additional Counsel appear on the reverse side of this cover*)

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

CHARLES C. CARELLA,
Counsel for Petitioner, Passaic Valley Sewerage Commissioners,
Gateway I, Suite 2404,
Newark, New Jersey 07102.

JOHN G. GILFILLAN, III,
Of Counsel.

STEPHEN J. MOSES,
Counsel for Petitioner, Bergen County Sewer Authority,
One Essex Street,
Hackensack, New Jersey 07601.

MENELAOS W. TOSKOS,
Of Counsel.

VINCENT J. JENNINGS,
Counsel for Petitioner, Township of Middletown Sewerage Authority,
110 Highway 35,
Red Bank, New Jersey 07701.

FURMAN AND JENNINGS,
Attorneys.

RAYMOND G. TOMASZEWSKI,
Counsel for Petitioner, The Linden Roselle Sewerage Authority,
812 North Wood Avenue,
P.O. Box 626,
Linden, New Jersey 07036.

TABLE OF CONTENTS

PAGE

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED FOR REVIEW 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 4

ARGUMENT—Petitioner advances the folowing reasons for the allowance of certiorari:

A. The holding of the Court of Appeals that failure of plaintiffs to give the statutory notice of intention to institute a complaint based on the Federal Water Pollution Control Act (FWPCA) 33 U.S.C. Secs. 1251 et seq., 1365, and on the Marine Protection, Research and Sanctuaries Act (MPRSA) 33 U.S.C. Secs. 1401 et seq., 1415, is not fatal to claims for relief under those statutes, is erroneous; and the Courts of Appeals are in conflict on the issue, rendering review by this Court highly desirable 10

B. The holding of the Court of Appeals that a private citizen may maintain an action under 28 U.S.C. Sec. 1331 against a state governmental agency for pollution of ocean waters on the basis of a federal common-law nuisance theory is erroneous; and the federal courts of appeals are now in conflict on the issue, rendering review by this Court highly desirable 16

PAGE

1. Significance of Illinois v. Milwaukee 16

2. Any pre-existing theory of federal common-law nuisance by a private party against a public sewerage agency should be deemed pre-empted by the enactment of the 1972 Amendments of FWPCA, of MPRSA as amended in 1977, and of the administrative regulations adopted by EPA pursuant to both acts 21

3. Illinois v. Milwaukee authorizes only an injunction, not damages 24

C. Any tort claim for damages against the New Jersey sewage disposal agencies, including any based on a federal common-law nuisance claim, is barred by the Eleventh Amendment and/or the New Jersey Tort Claims Act since those agencies by New Jersey law partake of New Jersey's sovereign immunity, and the waiver of such immunity here is predicated on conditions which plaintiffs have not satisfied. Due respect for States under appropriate principles of federalism bespeaks review of this issue by this Court, the Court of Appeals having resolved it erroneously .. 25

1. As to immunity under the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq. (L. 1972, c. 45) 25

2. As to sovereign immunity under the Eleventh Amendment 28

CONCLUSION 31

PAGE

APPENDIX:

Opinion of the Court of Appeals 1a

Judgment of the Court of Appeals 37a

Opinion of the District Court 40a

Order of the District Court 68a

Constitutional Provision and Statutes Involved 71a

Eleventh Amendment to Constitution of the United States 71a

28 U.S.C. Sec. 1254 ..... 71a

28 U.S.C. Sec. 1291 ..... 71a

28 U.S.C. Sec. 1331 ..... 71a

28 U.S.C. Sec. 1333 ..... 72a

33 U.S.C. Sec. 407 ..... 72a

33 U.S.C. Sec. 1251 ..... 73a

33 U.S.C. Sec. 1311 ..... 76a

33 U.S.C. Sec. 1316 ..... 82a

33 U.S.C. Sec. 1317 ..... 84a

33 U.S.C. Sec. 1341 ..... 88a

33 U.S.C. Sec. 1343 ..... 93a

33 U.S.C. Sec. 1345 ..... 95a

33 U.S.C. Sec. 1365 ..... 96a

33 U.S.C. Sec. 1401 ..... 98a

33 U.S.C. Sec. 1411 ..... 99a

33 U.S.C. Sec. 1412 ..... 100a

33 U.S.C. Sec. 1412a. 103a

PAGE

33 U.S.C. Sec. 1415 ..... 104a

42 U.S.C. Sec. 7604 ..... 105a

N.J.S.A. 59:1-2 ..... 108a

N.J.S.A. 59:1-3 ..... 109a

N.J.S.A. 59:2-1 ..... 109a

N.J.S.A. 59:8-3 ..... 109a

N.J.S.A. 59:8-8 ..... 109a

N.J.S.A. 4:14A-7 ..... 110a

Cases Cited

Byram River v. Village of Port Chester, 394 F. Supp. 618 (S.D.N.Y. 1975) 17

City of Highland Park v. Train, 519 F.2d 681 (7 Cir. 1975), cert. denied 424 U.S. 927 (1976) 15, 17

Committee for Con. of Jones Falls Sewage System v. Train, 375 F.Supp. 1148 (D. Md. 1974), affirmed on other grounds consistent with that of the District Court on the instant issue, 539 F.2d 1006 (4 Cir. 1976) 17-20, 23

Conservation Soc. of S. Ver. Inc. v. Secretary of Tran., 508 F.2d 927 (2 Cir. 1974) 15

Cort v. Ash, 422 U.S. 66 (1975) 12

Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) 17

Hinderlider v. La Plata R. & Cherry Creek Ditch Co., 394 U.S. 92 (1938) 18

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) 8, 16-21, 23-25

PAGE

Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) 28

Lincoln County v. Luning, 133 U.S. 529 (1890) 29

Monell v. N.Y.C. Department of Public Service, 436 U.S. 658 (1978) 28

Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274 (1977) 28-30

Natural Resources Defense Council, Inc. v. Callaway, 524 F.2d 79 (2d Cir. 1975) 15

Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692 (D.C. Cir. 1975) 15

New York v. New Jersey, 256 U.S. 296 (1921) 29

Parsell v. Shell Oil Co., 421 F.Supp. 1275 (D. Conn. 1976), aff'd without opinion sub nom. East End Yacht Club, Inc. v. Shell Oil Co., 573 F.2d 1289 (2 Cir. 1977) 17, 19

Potomac Riv. Ass'n. Inc. v. Lundeberg Md. Sea. Sch., Inc., 402 F.Supp. 344 (D. Md. 1975) 26

Richie v. Cahall, 386 F.Supp. 1207 (D. N.J. 1974) 27

S. E. Friel Co. v. N.J. Turnpike Auth., 73 N.J. 107 (1977) 27

Sierra Club. v. Morton, 405 U.S. 727 (1972) 13, 14

Texas v. Pankey, 441 F.2d 236 (10 Cir. 1971) 17, 19

Touche-Ross & Co. v. Redington, —— U.S. ——, 61 L. Ed.2d 82 (1979) 12

Wade v. N.J. Tpke. Auth., 132 N.J. Super. 92 (L. Div. 1975) 28

PAGE

United States Constitution Cited

Eleventh Amendment 4, 25, 28-30

Statutes Cited

N.J.S.A. 40:14A-1 ..... 5, 9
N.J.S.A. 40:14A-7 ..... 4, 9
N.J.S.A. 40:14B-1 9
N.J.S.A. 40:14B-4 9
N.J.S.A. 58:14-1 9
N.J.S.A. 58:14-2 9
N.J.S.A. 59:1-1 (New Jersey Tort Claims Act) 3, 4, 9, 25
N.J.S.A. 59:1-2 ..... 4, 28
N.J.S.A. 59:1-3 4
N.J.S.A. 59:1-4 25
N.J.S.A. 59:2-1 ..... 4, 26
N.J.S.A. 59:8-3 ..... 4, 27
N.J.S.A. 59:8-8 ..... 4, 27
N.J.S.A. 59:8-9 27

28 U.S.C.:

Sec. 1254 (1) 2
Sec. 1291 2
Sec. 1331 ..... 3, 16
Sec. 1331 (a) 2, 4
Sec. 1333 ..... 2, 4

PAGE

33 U.S.C. (Federal Water Pollution Control Act, as amended):

Sec. 1251 ..... 2-4, 7, 10

33 U.S.C. (Marine Protection Research and Sanctuaries Act of 1972, as amended):

Sec. 1311 22

Sec. 1311(a) 21

Sec. 1311(h) 22

Sec. 1316 22

Sec. 1317 22

Sec. 1341 22

Sec. 1345 22

Sec. 1365 ..... 3, 10, 13

Sec. 1365 (a) 14

Sec. 1365 (a) (1) 13

Sec. 1365 (b) 12, 14

Sec. 1365 (e) 12, 14

Sec. 1365 (g) 14

Sec. 1365 (g) (2) 14

Sec. 1401 ..... 2-4, 7, 10

Sec. 1411 22

Sec. 1412(a) 22

Sec. 1412a. 6, 23

Sec. 1413 22

Sec. 1415 ..... 3, 10, 13

Sec. 1415 (g)(5) 12

PAGE

33 U.S.C. (Refuse Act, 1899):

Sec. 407 6

42 U.S.C.:

Sec. 7604 ..... 4, 15

Regulation Cited

40 C.F.R.:

Parts 220 to 229 7

Other Authorities Cited

Friendly, "In Praise of Erie—and the New Federal Common Law," 39 N.Y.Univ.L.Rev. (1964):

383, 405 passim 18

S. Rep. No. 414, 92nd Cong., 1st Sess., Reported in 1972, U.S. Code Cong. & Ad. News 3668, 3746 13

USEPA, Environmental Impact Statement on the Ocean Dumping of Sewage in the New York Bight (Final Statement, September, 1978):

p. 17 6

pp. 54-82, 203-207 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

MIDDLESEX COUNTY SEWERAGE AUTHORITY, PASSAIC VALLEY SEWERAGE COMMISSIONERS, MIDDLETOWN SEWERAGE AUTHORITY, BERGEN COUNTY SEWER AUTHORITY and THE LINDEN ROSELLE SEWERAGE AUTHORITY,

Petitioners,

v.

NATIONAL SEA CLAMMERS ASSOCIATION, GOSTA LOVGREN, CITY OF NEW YORK, HONORABLE ABRAHAM BEAME, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RUSSELL E. TRAIN, individually an as ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES ARMY CORPS OF ENGINEERS, MARTIN R. HOFFMANN, individually and as SECRETARY OF THE UNITED STATES DEPARTMENT OF THE ARMY, NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION, OGDEN R. REID, individually and as COMMISSIONER OF THE NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, DAVID J. BARDIN, individually and as COMMISSIONER OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, WEST LONG BEACH SEWER DISTRICT, COUNTY OF WESTCHESTER, DEPT. OF ENVIRONMENTAL FAC., CITY OF LONG BEACH AND CITY OF GLEN COVE and THE JOINT MEETING OF ESSEX AND UNION COUNTIES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Middlesex County Sewerage Authority, Passaic Valley Sewerage Commissioners, Middletown Sewerage Authority, Bergen County Sewer Authority and Linden Roselle Sewerage Authority petition for the issuance of a writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit in this case.

Opinions Below

The opinion of the Court of Appeals, filed February 5, 1980, is as yet unreported (App. pp. 1a, *et seq.*). The opinion of the United States District Court for the District of New Jersey, filed August 14, 1978, is unreported (App. pp. 49a, et seq.). The judgments of the Court of Appeals (App. p. 37a) and the District Court (App. p. 68a, et seq.) are set forth in this Appendix.

Jurisdiction

Jurisdiction of this Court is pursuant to 28 U.S.C. §1254 (1). Jurisdiction of the Court of Appeals was pursuant to 28 U.S.C. §1291.

The grounds of jurisdiction of the District Court invoked by plaintiffs, to the extent that they were sustained by the Court of Appeals in reversing the dismissal of the action by the District Court, are based upon the Federal Water Pollution Control Act, as amended, 33 U.S.C. §1251, et seq. (FWPCAA), the Marine Protection Research and Sanctuaries Act of 1972, as amended (33 U.S.C. §1401 et seq.) (MPRSA), 28 U.S.C. §1331 (a) and 28 U.S.C. §1333.

Questions Presented for Review

1. Whether the failure of a plaintiff to give the statutory sixty-day notice of intention to institute a civil action based on the Federal Water Pollution Control Act as amended (FWPCAA), 33 U.S.C. §1251 *et seq.*, §1365, and on the Marine Protection Research and Sanctuaries Act (MPRSA), 33 U.S.C. §1401 *et seq.*, §1415, is not fatal to a claim for relief under those statutes asserting damage from ocean pollution.

2. Whether a private citizen may maintain a claim in federal court under 28 U.S.C. §1331 against a state government agency engaged in sewage disposal for relief for ocean pollution damage on the basis of a federal common-law tort of nuisance; whether in any such suit the relief may encompass pecuniary damages.

3. Whether any claim for pollution of ocean waters on the basis of a federal common-law tort of nuisance, if available to a private citizen, is not preempted by the present comprehensive regulatory scheme in respect of ocean pollution constituted by FWPCAA and MPRSA (including its 1977 amendment) and administrative regulations adopted thereunder.

4. Whether an action by New Jersey citizens for damages for tortious injury arising out of ocean pollution against a New Jersey state sewerage agency is maintainable in a federal court, under either the maritime or admiralty jurisdiction or under 28 U.S.C. §1331 founded on a federal common-law tort of nuisance, if there has been a failure on the part of the plaintiffs to serve the agency with a timely notice of claim as required by the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.*

5. Whether any tort claim for damages against a New Jersey sewage disposal agency, whatever the jurisdictional

basis for maintaining such an action in a federal court, is not offensive to the Eleventh Amendment in light of the sovereign immunity of such agencies as arms of the State of New Jersey under the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.,* the limited waiver of such immunity by said statute and plaintiffs' failure to comply with the statutory conditions of such waiver.

Constitutional and Statutory Provisions Involved

The constitutional provision involved is the Eleventh Amendment to the United States Constitution.

The statutoy provisions involved are the Federal Water Pollution Control Act, as amended, 33 U.S.C. §1251, et. seq. (FWPCAA), the Marine Protection Research and Sanctuaries Act of 1972, as amended (MPRSA), (33 U.S.C. §1401 et seq.), 28 U.S.C. §1331 (a), 28 U.S.C. §1333 and 42 U.S.C. §7604.

The New Jersey statutory provisions involved are the New Jersey Tort Claims Act, N.J.S.A. 59:1-2, 3, N.J.S.A. 59:2-1, N.J.S.A. 59:8-3, N.J.S.A. 59:8-8 and N.J.S.A. 40:14A-7.

The text of the constitutional and statutory provisions involved is set forth in the Appendix (App. pp. 71a, et seq.).

Statement of the Case

This petition for certiorari is filed by a number of New Jersey public sewerage disposal agencies made defendants in the action instituted in the District Court. The petition seeks review of a judgment of the United

States Court of Appeals for the Third Circuit which reversed a judgment of the United States District Court for the District of New Jersey (Honorable H. Curtis Meanor) which dismissed on grounds either of absence of jurisdiction or failure to state a claim upon which relief can be granted the complaint of the plaintiffs seeking both injunctive relief and damages against numerous federal, New York and New Jersey state officials and agencies concerned either with the public disposition of sewage or the administrative regulation of the activities of such agencies. Some of the defendant sewage disposal agencies, including these petitioners, are constituted under New Jersey state authority, others under New York.

The gravamen of the complaint, set forth in eleven counts, is that defendants by acts of commission or omission have caused or permitted the pollution of the Atlantic Ocean resulting in such damage to the marine environment as to have adversely affected plaintiffs' commercial business of fishing, clamming and lobstering in the waters of the ocean.

Petitioners are public instrumentalities of New Jersey created under and pursuant to N.J.S.A. 40:14A-1 et seq., 40:14B-1 et seq. or 58:14-1 et se
Petitioner Middlesex County Sewerage Authority (MCSA) is generally typical of the other petitioners in scope of activity, some of them being smaller and others larger. MCSA is responsible for the sewage disposal of 28 municipalities in and adjacent to Middlesex County and a number of large industries. The population it serves is approximately 600,000. Its capital investment is about $250,000,000 and its operating budget for 1980 is $14,874,000. Its operating expenses are met by local taxes and sewer connection fees charged member municipalities and industrial users. Several of petitioners are undergoing a captial expansion program mandated by state

and federal environmental authorities and partially financed by federal grants pursuant to FWPCAA and MPRSA. In the case of MCSA, the expenses of expansion and rising operating costs have almost doubled charges to users in the past year.

Existing regulations of the United States Department of Environmental Protection (EPA) and the 1977 amendment of MPRSA mandate cessation of ocean dumping of sewage sludge by December 31, 1981, 33 U.S.C. §1412a., and petitioners are in the course of active transition from ocean dumping to landbased alternatives for disposition of such sewage sludge under an approved schedule of interim permits issued by EPA designed to effect such a shift by the stated termination date. Petitioners are subject also to EPA permit control of their discharge of sewage effluent into various stream and the ocean under authority of FWPCAA.

In the instant class action, plaintiffs seek not only judicial abatement of ocean dumping of sewage sludge by petitioners, thereby disrupting the measured progress toward that end now being effected administratively under congressional mandate and direction, but also demand, on behalf of members of the affected class, compenatory damages of $250,000,000 and punitive damages of $250,000,000 from defendants.

Since 1924 municipal sewerage authorities in New York and New Jersey and the Army Corps of Engineers have dumped sewage sludge and dredged materials at a dump site in the Atlantic Ocean approximately 12 miles from New York City. See *USEPA, Environmental Impact Statement on the Ocean Dumping of Sewage in the New York Bight* (Final Statement, September, 1978, p. 17) ("EIS"). Ocean dumping of wastes began to be regulated federally in 1899, Refuse Act, 33 U.S.C. §407, and

under earlier versions of FWPCAA, *i.e.* Act of June 30, 1948, c. 758. Such federal regulation was vastly expanded during the last decade by the 1972 amendments of FWP CAA, the adoption in 1972 of the MPRSA and the 1977 amendment of that act, noted above, mandating termination of dumping of sewage sludge in the ocean by December 31, 1981.

Under the Refuse Act, the Army Corps of Engineers was authorized to grant dumping permits. But under the more recent FPWCAA and MPRSA legislation the permit-issuing authority was transferred to EPA and specific criteria for the issuance of permits were established administratively. 33 U.S.C. §1251 et seq., 33 U.S.C. §1401 et seq., 40 C.F.R. Parts 220 to 229.

In 1974 EPA undertook a study to determine whether the sewage dumping site in the New York Bight (12 miles off Ambrose Light) should be relocated. EIS, *supra,* p. 1. A draft Environmental Impact Statement was issued in early 1976. In the summer of 1976 there was a fish kill off the New Jersey coast which constitutes the basis for the complaint of the plaintiffs herein. The fish kill was the subject of comprehensive federal, state and local investigations which concluded that ocean dumping of sewage sludge was only a minor contributing factor. EIS, *supra,* pp. 54-61. That isolated phenomenon led EPA to make further studies on the ocean dumping situation, resulting in a new EIS in 1978. That reached the conclusion that under all the attendant circumstances the most advisable course of action was for the continuance of ocean dumping of sewage sludge at the present site but with encouragement for the construction of improved sewage treatment plants to minimize marine damage. EIS, *supra,* pp. 62-82, 203-207. Several of petitioners have recently substantially improved their sewage treatment processes.

Insofar as concerns these petitioners, the disposition of the issues presented on defendants' motions to dismiss by the lower courts was as follows.

As to the claims asserted under FWPCAA and MPRSA, the District Court held that the claims must be dismissed because of failure of timely service of notice on the defendants prior to institution of the action, as required by the respective statutes (App. p. 56a). On this issue the Court of Appeals reversed, holding that absence of notice was not fatal because of the "savings clause" of the citizens action provisions of the statutes which preserves any existing right of action under statute or common law (App. p. 10a). As to plaintiffs' contention that, independent of any right of action under the express citizens' suit provisions of FWPCAA and MPRSA, they could maintain the suit pursuant to (a) an implied right of action under those statutes and (b) the theory of federal common-law nuisance, relying primarily on *Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972), the District Court held that the latter remedy was available only in favor of states, not private parties, and that the notice provisions of the statutes remained applicable to any actions brought under the "savings clause." (App. p. 47a). The Court of Appeals reversed these determinations, holding that a private federal common-law nuisance claim was available under the *Illinois* case and an implied claim under FWP CAA and MPRSA as well. (App. pp. 28a-29a, 6a-14a).

As concerns plaintiffs' reliance upon admiralty and maritime jurisdiction of the federal courts, the District Court held that there was a failure to plead a cause of action cognizable under such jurisdiction. The court alternatively held that even if the complaint was read to encompass a substantive claim under such jurisdiction, it would have to be dismissed for failure of compliance with the

notice requirements of state tort claims statutes (excepting in the case of New York City). (App. pp. 62a, 63a). The Court of Appeals held that a more liberal reading of the complaint was required at the pleading stage and that the asserted cause of action was viable although essentially identical with the federal common-law tort nuisance claim. (App. pp. 29a-31a). However, the Court of Appeals failed to deal with the alternative rejection of the maritime tort claim by the District Court based upon failure to meet the notice requirements of the state tort claims statutes.

Petitioners sought on appeal to sustain the judgment of the District Court, insofar as the complaint demands money damages, on grounds of sovereign immunity under the Eleventh Amendment. That defense asserts that in and by the enactment of the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.*, the State had vested each of petitioners as a "public entity" with conditional sovereign immunity and that plaintiffs had not met the statutory conditions of pre-suit notice of claim for waiver of such immunity. The Court of Appeals summarily rejected the sovereign immunity defense, citing no cases but only N.J.S.A. 40:14B-4* and N.J.S.A. 58:14-2 and noting that the defendants were municipal corporations (App. p. 36a).

---

* Petitioners are created pursuant to either N.J.S.A. 40:14A-1 et seq., N.J.S.A. 40:14B-1 et seq. or N.J.S.A. 58:14-1 et seq. All have power to sue or be sued. The Court of Appeals may have thought the suability of such an agency, see N.J.S.A. 40:14A-7, settled the matter of sovereign immunity. We will demonstrate *infra*, pp. 27-28, that New Jersey law is to the contrary.

ARGUMENT

Petitioner advances the following reasons for the allowance of certiorari.

A.

The holding of the Court of Appeals that failure of plaintiffs to give the statutory notice of intention to institute a complaint based on the Federal Water Pollution Control Act (FWPCA) 33 U.S.C. §§1251 *et seq.*, 1365, and on the Marine Protection, Research and Sanctuaries Act (MPRSA) 33 U.S.C. §§1401 *et seq.*, 1415, is not fatal to claims for relief under those statutes, is erroneous; and the Courts of Appeals are in conflict on the issue, rendering review by this Court highly desirable.

In making the present point it will suffice to cite the citizens suit provisions of FWPCAA since substantially similar provisions are contained in MPRSA.

So far as pertinent to the instant dicussion, 33 U.S.C. §1365 is to the following effect:

> "(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order isued by the Administrator or a State with respect to such a standard or limitation, or
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

b) No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator, * * *

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard of limitation or to seek any other relief (including relief against the Administrator or a State agency)."

The District Court held, and it is not disputed, that plaintiffs failed to comply with the notice requirement of

paragraph (b) of the foregoing section in respect of any petitioner. It is consequently clear that on the face of the statute this action, to the extent that it purports to be based on FWPCAA and MPRSA, is untenable as against petitioners.

The Court of Appeals held that the action nevertheless remained viable under these acts by virtue of the "savings clause" illustrated by paragraph (e) of §1365* which states that nothing in the section "shall restrict any right which any person * * * may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief * * *".

Under that entry wedge the Court of Appeals drew an implication of a general FWPCAA and MPRSA federal cause of action on behalf of private parties, free of the notice requirements of those acts, under the rationale of the line of cases represented by *Cort* v. *Ash,* 422 U.S. 66 (1975) and *Touche-Ross & Co.* v. *Redington,* U.S. , 61 L. Ed.2d 82 (1979) (App. pp. 14a-15a). As the Court of Appeals conceded, however, the *Touche-Ross* decision subordinates the so-called four-part test of *Cort* v. *Ash* in favor of seeking out the underlying congressional intent as to whether a private remedy based upon the policy of the statute was to be permitted. 61 L. Ed.2d at 95-96. We submit that all of the available indicia of intent, both on the face of the statutes and extrinsic thereto, render evident a contrary intent.

As to the evidence on the face of the statute, the error in the Court of Appeals rationale is obvious. Paragraph (e) does not purport to provide an additional remedy *under FWPCAA* (or MPRSA) but merely to save from any arguably preclusive effect of the remainder of the

---

* The parallel provision of §1415 is paragraph (g)(5).

section any cause of action for relief which a person might have under any other statute or under common law. Whether there is indeed *any other* statutory or common-law right to relief available to plaintiffs against petitioner, independent of FWPCAA and MPRSA, is a distinct question to be addressed under Reason B hereinafter. For present purposes, the point is that there is no tenable hypothesis for positing congressional intent for additional FWPCAA or MPRSA causes of action under §1365 or §1415. Indeed, the Senate report on the FWPCAA bill explained, in reference to the savings clause:

> "It should be noted * * * that the section would specifically preserve any rights or remedies *under any other law.*" (emphasis supplied)
>
> S. Rep. No. 414, 92nd Cong., 1st Sess., Reported in 1972, U.S. Code Cong. & Ad. News 3668, 3746.

The Court af Appeals alluded to this history but dismissed it with the conclusional observation that the court was "not persuaded that this paraphrase of the wording of the Act was intended to preclude the finding of a private remedy under the Act." (App. p. 16a) We respond: Why not? The act fashions a specific citizens remedy and saves any private remedies which may exist under any other act or common law. What basis remains for implying yet another remedy under the act itself?

To buttress its contention of a general private cause of action under FWPCAA, the Court of Appeals labors to establish a rationale of entitlement to an action by *non-injured* citizens under §1365 (a) (1) and of a companion species of action by *injured* citizens under paragraph (e) of the section. It bases the distinction upon legislative history supposedly designed to meet the decision of this court in *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). (App.

p. 7a). But the thesis does not withstand scrutiny of the statutory language. Concededly *Sierra Club* held that review of federal agency action by parties who could not show injury was not available under the Administrative Procedure Act. However, the definition in §1365 (g) of a "citizen" who is permitted to institute a civil action under paragraph (a) is "a person or persons having an interest which is or may be adversely affected." That definition tracks the *Sierra Club* language concerning injured persons (the suitor must show "that he is himself adversely affected." 405 U.S. at 740). It is thus clear that section (a) actions may be brought only by injured persons, contrary to the thesis of the Court of Appeals, and the supposed distinction advanced to support its holding that there is a private action independent of paragraph (a) does not stand up.

In Reason B hereinafter, in the course of refuting the thesis of the Court of Appeals that §1365(e) contemplates a residual federal common-law nuisance action for the benefit of private plaintiffs, we have advanced additional reasons why it is unsound to imply from the statute an intent to permit a private cause of action under §1365 other than the specific citizens remedy afforded by paragraph (a), requiring prior notice to the defendants. We incorporate such argument under the present Reason by reference.

It is earnestly submitted that the composite consideration reflective of legislative intent militate against any notion of a design to provide any private cause of action *based upon* FWPCAA and MPRSA.

We consequently urge that to the extent that the present action is posited upon either of the federal environmental statutes cited it must fall for failure to give the notice required by paragraph (b) of FWPCAA and (g)(2) of MPRSA.

The best reasoned prior decision on the point is *City of Highland Park* v. *Train,* 519 F.2d 681 (7 Cir. 1975), *cert. denied* 424 U.S. 927 (1976). While that case dealt with the Clean Air Amendments of 1970, the decision is in point because the Clear Air statute is essentially the same as those here under consideration in respect of the notice requirement. See 42 U.S.C. §7604. The court held the failure to give statutory notice to be fatal to the action there involved. It pointed out that although there was clear indication of legislative intent to allow citizen participation in the enforcement of the act, the legislative history also demonstrated:

> "that Congress intended to provide for citizens' suits in a manner that would be least likely to clog already burdened federal courts and most likely to trigger governmental action which would alleviate any need for judicial relief. It was in response to these concerns that the statutory notice provisions were included in section 304. Congress's intention would be frustrated if the statutory mandate of section 304(b) were ignored." (footnotes omitted) 519 F.2d at 690-691.

Concededly contrary decisions have been rendered by two other Courts of Appeals. *Conservation Soc. of S. Ver. Inc.* v. *Secretary of Tran.,* 508 F.2d 927, 938 (2 Cir. 1974); *Natural Resources Defense Council, Inc.* v. *Train,* 510 F.2d 692 (D.C. Cir. 1975); *Natural Resources Defense Council, Inc.* v. *Callaway,* 524 F.2d 79 (2d Cir. 1975). A close reading of these opinions fails to reveal any satisfying rationale for an interpretation of the statutory savings clause which would depart from its plain facial significance as reserving *any other* existing remedies rather than, as held in these cases, creating another remedy under and pursuant to the statute in which the savings pro-

visions were incorporated. This same observation is fully applicable to the reasoning of the Court of Appeals in the instant case.

In view of the highly significant public policy aim served by the statutory requirement of notice, particularly in relation to the federal officials charged with enforcement of these comprehensive environmental statutes, and the unwarranted deprecation of the notice requirement by the determination of the Court of Appeals in this case, it is eminently desirable that this Court take this case to resolve the conflict among the Courts of Appeals on the issue.

B.

The holding of the Court of Appeals that a private citizen may maintain an action under 28 U.S.C. §1331 against a state governmental agency for pollution of ocean waters on the basis of a federal common-law nuisance theory is erroneous; and the federal courts of appeals are now in conflict on the issue, rendering review by this Court highly desirable.

1. Significance of Illinois v. Milwaukee.

The crux of the difference between the District Court and the court of Appeals with respect to the issue stated is whether this court in *Illinois* v. *Milwaukee,* 406 U.S. 91 (1972), intended to announce a federal common-law nuisance action for water pollution against public sewerage agencies available under 28 U.S.C. §1331 to private citizens as well as to states. It was the view of the District Court that the remedy was confined to states as plaintiffs; of the Court of Appeals, that it extended to private complainants as well. This is an issue on which the Court of Appeals is in conflict with other courts of appeals.

In agreement with the District Court in this case are the holdings in *Committee for Con. of Jones Falls Sewage System* v. *Train,* 375 F.Supp. 1148 (D. Md. 1974), affirmed on other grounds consistent with that of the District Court on the instant issue, 539 F.2d 1006 (4 Cir. 1976) (en banc); *Parsell* v. *Shell Oil Co.,* 421 F.Supp. 1275 (D. Conn. 1976), aff'd without opinion *sub nom. East End Yacht Club, Inc.* v. *Shell Oil Co.,* 573 F.2d 1289 (2 Cir. 1977); *cf. Highland Park* v. *Train, supra,* (519 F.2d 681). The only contrary view we have found, supportive of the Court of Appeals in this case, is *Byram River* v. *Village of Port Chester,* 394 F.Supp. 618 (S.D.N.Y. 1975).

A careful analysis of *Illinois* v. *Milwuakee* is convincing that the court's declaration of the availability of a federal common-law nuisance claim was actuated by the felt need to afford the State of Illinois a remedy for pollution of its waters emanating from beyond its borders. In developing its rationale the Court relied heavily upon the comparable decisions in *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230 (1907) and *Texas* v. *Pankey,* 441 F.2d 236 (10 Cir. 1971). 406 U.S. at 100-104. In *Illinois* the Court quoted with approval from *Texas* v. *Pankey, supra* (441 F.2d at 240) as follows:

> "As the field of federal common law has been given necessary expansion into matters of federal concern and relationship (where no applicable federal statute exists, as there does not here), the ecological rights of a State in the improper impairment of them from sources outside the State's own territory, now would and should, we think, be held to be a matter having basis and standard in federal common law and so directly constituting a question arising under the laws of the United States."
>
> 406 U.S. at 99-100.

Federal common law necessarily evolves on a case-by-case basis.* Sound principles of judicial evolution of the federal common law in the vital environmental area should, we respectfully submit, proceed narrowly and avoid untoward conflict with or frustration of existing regulatory legislation pertaining to the same subject matter. From that point of view, *Illinois* v. *Milwaukee* should not at this time be expanded beyond its apparent motivating rationale—*i.e.*, to afford a state or a litigant representing a state's interest (*cf. Hinderlider* v. *La Plata R. & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938)) the legal protection against pollution emanating from beyond the state's borders required by the inability of states in this federal union otherwise to be relieved from such harm. Insofar as affording citizens a remedy against the kinds of harm sued for in this case (*i.e.* at the hands of public sewerage agencies) the citizens' suit provisions of FWPCAA and MPRSA were envisaged by Congress to be both appropriate and adequate and the ~~noted~~ notice provisions thereof to be integral to the remedy afforded. The savings clauses in both of the cited statutes could well have merely contemplated saving the continued availability of actions in state courts whether based on statute or common law or in federal courts on whatever residual basis might exist not incompatible with the legislative policies underlying these specific enactments.

In *Committee for Con. of Jones Falls Sewage System* v. *Train*, *supra*, the court observed that the plaintiffs in the two principal cases cited in *Illinois* v. *Milwaukee* were states and that each of those cases "indicates that the character of the plaintiffs as governmental units was integral to the determination that a federal cause of action

---

* See Friendly, "In Praise of *Erie*—and of the New Federal Common Law," 39 *N.Y.Univ.L.Rev.* 383, 405 *passim* (1964).

existed." 375 F.Supp. at 1153. Although affirming the determination of the District Court in that case on other grounds, the Court of Appeals for the Fourth Circuit on appeal therefrom rendered its independent analysis of *Illinois* v. *Milwaukee* and *Texas* v. *Pankey* as developing "[o]f necessity** a body of federal common law for the resolution of interstate pollution controversies when a state sought extra-territrial relief on behalf of her citizens." 539 F.2d at 1008. The court further observed that:

> "Perhaps with the exception of actions by the United States to abate public nuisances created in navigable waters by polluters, [citing cases] but consistent with §1251(b) [FWPCAA] the doctrine of *Illinois* v. *Milwaukee* has not been extended beyond the abatement of public nuisance in interstate controversies where the complainant is a state and the offenders are creating extra-territorial harm." (f.n. omitted) (per Haynsworth, C.J.)
> 539 F.2d at 1009.

Similarly emphasizing the significance of the character of the plaintiff in *Illinois* v. *Milwaukee* and in the cases there relied upon is *Parsell* v. *Shell Oil Co.*, 421 F.Supp. at 1280-1281 (aff'd without opinion, 573 F.2d 1289).

The Court of Appeals in the instant case lays stress (App. p. 25a) upon footnote 6 in *Illinois* v. *Milwaukee*, 406 U.S. at 105, to the effect that:

> "Thus, it is not only the character of the parties that requires us to apply federal law**[W]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law."

The implication of the Court of Appeals is that the footnote indicates that a state party plaintiff is not essential to the federal common-law nuisance action if the substantive federal question implicated is one calling for doctrinal uniformity. That thesis was refuted in the District Court opinion in *Committee for Con. of Jones Falls Sewerage System* v. *Train, supra,* 375 F. Supp. 1148), where the court in dealing with the same *Illinois* footnote said:

> "'it is not only the character of the parties that requires us to apply federal law.' This statement can be read in at least two different ways. It could mean a) that there were other considerations sufficient in themselves to require application of federal law, or b) that there were other federal interests which in addition to the character of the parties required the application of federal law although those other interests in themselves would not have been sufficient. In the view this Court takes of the basis for the Supreme Court's decision, the latter interpretation is the proper one."
> 375 F.Supp. at 1154, n. 12

We submit that the foregoing analysis should be accepted by this Court as a sound explanation of the mooted footnote in *Illinois.* If the *Illinois* court had intended the newly announced federal common-law nuisance action to be available to private parties it is highly unikely that the opinion would have failed so to state explicitly.

2. *Any pre-existing theory of federal common-law nuisance by a private party against a public sewerage agency should be deemed pre-empted by the enactment of the 1972 Amendments of FWPCA, of MPRSA as amended in 1977, and of the administrative regulations adopted by EPA pursuant to both acts.*

In *Illinois* the Court made the prescient observation that

> "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution." 406 U.S. at 107.

When *Illinois* was decided the 1972 amendments of FWPCA had not yet come into effect nor had Congress enacted MPRSA. The present scope of these statutes and of the extent and effect of the administrative regulations adopted by EPA pursuant thereto effectively subjects petitioner[9] and similar potential water polluters to the closest and most detailed scrutiny and oversight readily conceivable. Every single pipe ("outfall") which can discharge pollutants into a navigable body of water must be approved by EPA. That agency also has the power and duty to impose stringent limitations on the content of those discharges and the manner in which they must be treated. The FWPCA amendments declare unlawful the discharge of any potential pollutant unless it complies therewith. 33 U.S.C. §1311(a).

Prior to the 1972 amendments of FWPCA the Administrator was required to prove individual responsibility for violations of water quality standards before establish-

ing criteria for discharges. The amendments mandated that the Administrator establish discharge standards in the first instance and take action against any point source in violation. §§1311, 1316, 1317.

The 1972 amendments establish a comprehensive licensing program under which no discharge into navigable body of water, whether by a municipality or by others, is permitted except pursuant to permit. §§1341, 1345. The amendments create a timetable for the elimination of water pollution. §1311. Municipal sewer systems must employ the best practicable waste treatment technology by July 1, 1983. Limited discretion is given the Administrator to modify requirements if specific stringent conditions are met. §1311(h). There are various additional regulatory modes and controls incorporated in the Act to achieve minimal water pollution as soon as practicable.

MPRSA (also known as the Ocean Dumping Act) prohibits the dumping of any material into ocean waters except as authorized by permit. 33 U.S.C. §1411. Section 1412(a) authorizes the Administrator to issue permits for the dumping of any material other than dredged material* where he determines that such dumping will not unreasonably degrade or endanger human health, welfare or amenities or the marine environment, ecological systems, or economic potentialities. The Administrator is directed to consider, in these respects, the need for the proposed dumping, the persistence and permanence of the effects of the dumping, and appropriate locations and methods of disposal, including land-based alternatives and the probable impact thereof upon considerations affecting the public interest. *Ibid.*

---

* §1413 establishes a dumping permit program for dredged materials under regulation of the Secretary of the Army.

We have seen above that by amendment of MPRSA in 1977 Congress decreed the termination of all ocean dumping of sewage sludge after December 31, 1981. 33 U.S.C. §1412a.

The act arms the Administrator with ample enforcement powers including that of assessment of civil penalties up to $50,000 for any violation and provides for additional criminal sanctions.

As already noted, these petitioners are now conducting ocean dumping of sewage sludge under interim permits conditioned upon compliance with schedules for construction of land-based alternatives which call for cessation of ocean dumping of sewage sludge by December 31, 1981.

In light of all the foregoing, it is earnestly submitted that the preconditions for declaration of statutory preemption of the putative federal common-law nuisance action in this area, as envisaged by the statement in *Illinois* v. *Milwaukee* qouted above, has arrived. It would seem intolerable that a public agency so vitally serving the public health and welfare and so closely regulated in all of its operations by both federal and state statutory and administrative controls as these petitioners should be subjected to the prospect either of a general equity injunction or that of an action for damages demanding many millions of dollars at the instance of private claimants. If these plaintiffs may sue, so may countless others.

The observations of Judge Haynsworth in *Committee for Con. of Jones Falls Sewerage System* v. *Train, supra,* (539 F.2d 1006) seem particularly cogent in this regard. He stated:

> "Indeed, it would be an anomaly to hold that there was a body of federal common law which proscribes conduct which the 1972 Act of Congress

> legitimates. The defendants are in compliance with the statute. They are operating under a permit issued in accordance with the statute and the authorization of the Environmental Protection Agency. The Congress and the Executive Department, acting through the Environmental Protection Agency, have declared their conduct lawful until the time for the application of more restrictive standards." *Id.* at 1009.

It is consequently submitted that Congress has by the enactment of the amendments to FWPCAA and of MPRSA and the creation of the comprehensive regulatory scheme thereunder preempted any general federal tort claim against petitioners in respect of conduct regulated thereby. Certiorari should issue to settle this all-important public law question and furnish guidance to the federal courts as to the present-day significance of *Illinois* v. *Milwaukee.*

3. *Illinois v. Milwaukee authorizes only an injunction, not damages.*

Whatever may be thought of the contentions advanced in the two subpoints hereinabove, there can be no dispute but that *Illinois* v. *Milwaukee, supra,* is authority only for a federal common-law nuisance action to abate a nuisance and not for damages. Abatement of the nuisancce was all the complaint demanded. 406 U.S. at 93. The entire rationale of the decision was the need of a state for abatement of pollution emanating from beyond the borders of that state. The Court, in discussing the criteria for adjudication in such suits stated: "There are no fixed rules that govern; these will be equity suits in which the informed judgment of the chancellor will largely govern."

406 U.S. at 107-108. Thus to the extent that *Illinois* v. *Milwaukee* is authoritative in this litigation it does not support the damages claims asserted by plaintiffs in this case. This Court should issue its writ both to reaffirm that important principle, which has been misconceived by the Court of Appeals, and to exercise its supervisory function over the lower federal courts.

C.

Any tort claim for damages against the New Jersey sewage disposal agencies, including any based on a federal common-law nuisance claim, is barred by the Eleventh Amendment and/or the New Jersey Tort Claims Act since those agencies by New Jersey law partake of New Jersey's sovereign immunity, and the waiver of such immunity here is predicated on conditions which plaintiffs have not satisfied. Due respect for States under appropriate principles of federalism bespeaks review of this issue by this Court, the Court of Appeals having resolved it erroneously.

1. As to immunity under the New Jersey Tort Claims Act. N.J.S.A. 59:1-1 et seq. (L. 1972, c. 45).

To the extent that the instant action is one seeking damages on any tort theory petitioners are public entities of New Jersey upon which the State of New Jersey by the cited statute has conferred qualified immunity. The Court of Appeals has erroneously rejected this contention by the unsupported blanket assertion that "the State Tort Claims Act may not pre-empt federal statutory or common-law causes of action". (App p. 35a, n. 49). We concede this statement is true as to actions for an injunction but submit it is incorrect insofar as it concerns actions for damages. See N.J.S.A. 59:1-4, which restricts the effect of the act to tort damages claims.

For present purposes, it makes no difference whether plaintiffs' claim in its damages aspect is posited upon the theories of maritime tort*, federal common-law nuisance or implied federal claim predicated upon FWPCAA or MPRSA. Basically, all three are the same in substance. The claim remains essentially one for damages on account of conduct of defendants hypothesized to be wrongful as a tort.

We are aware of no reported decision sustaining the availability of a tort claim for damages, whether of the federal common-law nuisance genus, implied from a federal regulatory statute or that constituted by the so-called maritime tort, against a state public entity, as against an affirmative legislative declaration of that state immunizing the entity from libility for damages. The contrary holding by the Court of Appeals warrants the supervisory oversight of this Court in the interests of appropriate principles of federalism and due regard for states' rights.

The New Jersey Tort Claims Act, N.J.S.A. 59:2-1, declares that except as otherwise provided by the Act "a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or public employee or any other person." Although the statute contains detailed provisions concerning circumstances in which the tort immunity of a public entity is waived and an action against it is permissible, it is nevertheless also provided that "no actions shall be brought against a public entity under this Act unless the claim upon which it is based shall have been presented in

---

* There is no liability premised on maritime tort if the conduct complained of is pursuant to official permit, as here. *Potomac Riv. Ass'n. Inc.* v. *Lundeberg Md. Sea. Sch., Inc.*, 402 F. Supp. 344, 357 (D. Md. 1975).

accordance with the procedure set forth in this Chapter". N.J.S.A. 59:8-3.

Claims are required to be presented to the public entity sought to be sued not later than the 90th day after accrual of the cause of action. N.J.S.A. 59:8-8. A judge is permitted to extend the time for filing of pre-suit notice within one year after accrual of the claim. N.J.S.A. 59:8-9. Absent notice of the claim within the time permitted, "the claimant shall be forever barred from recovering against a public entity". N.J.S.A. 59:8-8.

In the present instance it is undisputed that proper claims were not timely filed by plaintiffs with petitioners and that no timely application for permission to make a late filing was made to the Court. For this reason the District Court declared that plaintiffs were forever barred from bringing the tort claims under the admiralty or maritime jurisdiction of the federal court. (App. p. 63a). We submit this decision was a correct one and that it should extend to all plaintiffs' theories of claim. Cf. *Richie* v. *Cahall,* 386 F.Supp. 1207 (D. N.J. 1974), holding that under the Tort Claims Act the state may not be impleaded as a third party defendant in an auto accident suit in a diversity case.

As pointed out by the New Jersey Supreme Court in *S. E. Friel Co.* v. *N.J. Turnpike Auth.,* 73 N.J. 107, 114 n.3 (1977), prior to the adoption of the New Jersey Tort Claims Act in 1972 it had been held in New Jersey that the legislative empowerment of a public agency to sue or be sued constituted a consent to suits, including tort claims, against any agency so empowered. The Tort Claims Act, however, superseded that rule and restored immunity for such agencies except under the conditions for liability set forth in the act. *Ibid.* The fact that petitioner is a suable

public entity does not deprive it of the qualified immunity of the Tort Claims Act. *Wade* v. *N.J. Tpke. Auth.*, 132 N.J. Super. 92 (L. Div. 1975), approved in *S. E. Friel Co.* v. *N.J. Tunpike Auth., supra,* 73 N.J at 115-116

Thus, independent of any other contention set forth in this petition, the holding in by the Court of Appeals of petitioner on claims for tort damages was erroneous, within any theory of federal jurisdiction, and this Court should issue its writ ot review to settle this novel question for the federal judiciary.

2. *As to sovereign immunity under the Eleventh Amendment*

As shown in subpoint 1 above, it is evident that the State of New Jersey has undertaken to vest petitioners as public entities with qualified immunity from suits for damages. That immunity partakes of the sovereign immunity of the state. It has no other conceptual basis. See N.J.S.A. 59:1-2, by which the Legislature of New Jersey in enacting the New Jersey Tort Claims Act recognized the "inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity", but went on to declare it to be the public policy of the state "that public entities shall only be liable for their negligence within the limtations of this act * * *."

Petitioners are cognizant of the reiteration in recent years by this Court of the rubric that municipalities and political subdivisions or agencies of states do not enjoy tort immunity for purposes of the Eleventh Amendment. See *Monell* v. *N.Y.C. Department of Public Service,* 436 U.S. 658, 690, n.54 (1978); *Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S. 389, 412 (1978); *Mt. Healthy City Board of Ed.* v. *Doyle,* 429 U.S. 274, 280 (1977). How-

ever none of these cases explains why an instrumentality or arm of a state should not partake of the immunity of the state itself from actions by its citizens or those of other states ordained by the Eleventh Amendment, when the State expressly confers its immunity on the instrumentality.* Instead all such asseverations cite as dispositive authority the case of *Lincoln County* v. *Luning*, 133 U.S. 529 (1890). In that case, however, the action involved a suit on a county bond, and in its *ratio decidendi* the Court cited provisions of the Nevada constitution permitting the issuance of such bonds by municipal corporations and the institution of actions thereon. *Id.* at 531. The case was therefore a clear one of state waiver of immunity. The further implication in the opinion that municipalities and counties did not generally constitute the state was not supported except by reference to the incidence of prior suits where the question of immunity was not raised or decided. The holding in *Lincoln County* appears not to go beyond the proposition that where a state permits one of its instrumentalities to be sued on one of its authorized obligations sovereign immunity has been waived.

In *Mt. Healthy City Board of Ed.* v. *Doyle, supra,* in passing upon the question as to whether a municipal board of education was entitled to the bar of the Eleventh Amendment as against an action for damages by a citizen in a federal court, this Court said it would look to state law to see whether "the nature of the entity" was more

---

* It would seem anomalous that although a local sewerage authority of a state is deemed an arm of the state for purposes of responsibility of the state to another state for water pollution, *New York* v. *New Jersey*, 256 U.S. 296, 301-302 (1921), such agency should be denied the sovereign immunity of the state in respect of litigation concerning such pollution.

like a political subdivision or municipal corporation than like "an arm of the state". 429 U.S. at 280. Resort to Ohio law in that case led to the conclusion that the defendant board was not deemed an arm of the state. We submit that resort to New Jersey state law establishes that, whatever the semantic characterization of these public entities, the New Jersey Tort Claims Act has conferred upon them the aegis of state sovereignty and consequently state immunity from tort suit except within the conditions expressly specified in the statute for waiver of such immunity. No proper application of the rule of federal supremacy, or any other principle, warrants federal abrogation of such immunity.

We submit that the matter of availability of the Eleventh Amendment as a defense to federal damage suits against New Jersey municipalities invested with the state's sovereign immunity warrants reconsideration by this Court in the light of the argument hereinabove set forth and considerations of due regard for appropriate relationships between federal and state authorities.

CONCLUSION

We respectfully submit that the petition for certiorari should be granted. The legal problems implicated are of the highest degree of public importance. Petitioners as public sewage disposal agencies are performing a public health service of the highest magnitude. Under ever increasing financial and technological difficulties, they are endeavoring to meet their public responsibilities under a scheme of state and federal administrative regulations, authorized by statute, which is far reaching, comprehensive and designed to achieve the maximum freedom from pollution of the interstate waters in the New York metropolitan area by an early date.

Harassment of these agencies at the instance of private parties and organizations in such suits as this one obviously militates against the pursuit by these agencies of the public health and environmental objectives envisaged by the controlling legislation and the administrative regulations adopted and being enforced thereunder.

In these circumstances it is urgently in the public interest that this Court assume jurisdiction of this case and determine whether the federal environmental legislation involved herein does not fairly contemplate that such public sewage disposal agencies as petitioners be free from federal suit except under the precise terms and conditions specified in the legislation for actions by pri-

vate parties against such agencies, particularly that of pre-suit notice of claim.

Respectfully submitted,

WILENTZ, GOLDMAN & SPITZER,
A Professional Corporation,
Attorneys.
FRANCIS X. JOURNICK,
MARVIN J. BRAUTH,
Of Counsel.

JOHN G. GILFILLAN, III,
Of Counsel.

MENELAOS W. TOSKOS,
Of Counsel.

FURMAN AND JENNINGS,
Attorneys.

MILTON B. CONFORD,
Counsel for Petitioner, Middlesex County Sewer Authority.

CHARLES C. CARELLA,
Counsel for Petitioner, Passaic Valley Sewerage Commissioners.

STEPHEN J. MOSES,
Counsel for Petitioner, Bergen County Sewer Authority.

VINCENT J JENNINGS,
Counsel for Petitioner, Township of Middletown Sewerage Authority.

RAYMOND G. TOMASZEWSKI,
Counsel for Petitioner, The Linden Roselle Sewerage Authority.

APPENDIX

Opinion of the Court of Appeals

(Filed—February 5, 1980)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1360

NATIONAL SEA CLAMMERS ASSOCIATION and GOSTA LOVGREN,

Appellants,

v.

CITY OF NEW YORK, HONORABLE ABRAHAM BEAME, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RUSSELL E. TRAIN, individually and as ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES ARMY CORPS OF ENGINEERS, MARTIN R. HOFFMANN, individually and as SECRETARY OF THE UNITED STATES DEPARTMENT OF THE ARMY, NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION, OGDEN R. REID, individually and as COMMISSIONER OF THE NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION, NEW JERSEY DEPARTMENT OF

ENVIRONMENTAL PROTECTION, DAVID J. BARDIN, individually and as COMMISSIONER OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, BERGEN COUNTY SEWER AUTHORITY, THE JOINT MEETING OF ESSEX AND UNION COUNTIES, PASSAIC VALLEY SEWERAGE COMMISSIONERS, MIDDLESEX COUNTY SEWERAGE AUTHORITY, THE LINDEN ROSELLE SEWERAGE AUTHORITY, MIDDLETOWN SEWERAGE AUTHORITY, WEST LONG BEACH SEWER DISTRICT, COUNTY OF WESTCHESTER, DEPT. OF ENVIRONMENTAL FAC., CITY OF LONG BEACH AND CITY OF GLEN COVE.

(D.C. Civil No. 77-0126)

GIBBONS, *Circuit Judge.*

This case comes before us on an appeal by plaintiffs National Sea Clammers Association and Gosta Lovgren from a final order dismissing their complaint. Plaintiffs are an association whose members make their living harvesting fish and shellfish from the water and ocean beds of the Atlantic Ocean near New York and New Jersey, and an individual similarly employed. They sue on behalf of themselves and a class comprising all others similarly situated. Defendants are various federal, state, and local officials and governmental departments that are charged with environmental protection or that are responsible for sewage treatment and disposal.

Plaintiffs' complaint alleged that defendants discharged or permitted the discharge of certain nutrient-rich sew-

age and toxic wastes into the Atlantic Ocean or its tributaries. It further alleged that in 1976 these discharges caused a massive and rapid growth of algae from Long Island to Cape May and extending from a few miles to twenty miles offshore. When this algae mass bloomed and died it allegedly settled on the ocean's floor, and its subsequent decomposition created an anoxia, an oxygen deficiency, in the water near the ocean's floor, which caused death and other adverse effects on marine life, particularly on those life forms, such as shellfish, ill able to flee the afflicted area. Plaintiffs alleged violations of the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4361 (1976), the Federal Water Pollution Control Act, 33 U.S.C. §§1251-1376 (1976 & Supp. I), the Marine Protection Research and Sanctuaries Act of 1972, 33 U.S.C. §§1401-1444 (1976), the Rivers and Harbors Act of 1899, 33 U.S.C. §407 (1976), the New York Environmental Conservation Law, N.Y. Environ. Conserv. §1-0101 (McKinney 1973), the New Jersey Conservation and Development Law, N.J.S.A. 13:10-1 (1968), the federal common law of nuisance, and the fifth, ninth, and fourteenth amendments to the Constitution. Defendants moved for dismissal of all claims on the grounds that the court lacked subject matter jurisdiction, *see* Fed. R. Civ. P. 12(b)(1), or that the plaintiffs had failed to state a claim on which relief could be granted, *see* Fed. R. Civ. P. 12(b)(6). The complaint seeks injunctive relief, damages, mandamus to compel compliance with statutory duties, the imposition of fines and penalties for certain violations, the award to plaintiffs of one half of the fines assessed, and attorneys' fees. The trial court, holding that the submission of affidavits converted the motions into motions for summary judgment, granted defendants' motions as to each cause of action alleged.

The complaint was dismissed, with prejudice, on all claims except for two said to arise under state law which were dismissed without prejudice. This appeal followed. We discuss separately the various legal theories which were pleaded and rejected.

1. *The Federal Water Pollution Control Act*

The district court held that plaintiffs' failure to comply with the notice requirements of the Federal Water Pollution Control Act (FWPCAA)[1] deprived it of jurisdiction to entertain plaintiffs' claim that defendants violated their duties under that Act. Section 505(a) of the FWPCAA grants to any private citizen the right to sue to enforce compliance with effluent standards or limitations, 33 U.S.C. §1365(a)(1), or to compel the Administrator of the Environmental Protection Agency to perform nondiscretionary duties. *Id.* §1365(a)(2). Section 505(b) requires that in suits brought pursuant to subsection (a), 60 days' notice be given to specified parties to the suit.

---

[1] The Federal Water Pollution Control Act, 33 U.S.C. §§1251-1376 (1976 & Supp. I) was patterned after the Clean Air Act, 42 U.S.C. §§7401-7642 (1976). As originally enacted it was seriously deficient as a comprehensive regulatory scheme and was substantially amended in 1972. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, *reprinted in* [1972] U.S. Code Cong. & Ad. News 951, *codified in* 33 U.S.C. §§1251-1376 (1976); *see* W. Rodgers, Environmental Law §4.2 (1977). The 1972 amendments created the private right of action here in issue. Although the Act was further amended in 1977, those changes are not relevant to this litigation.

Id. §1365(b).[2] Regulations promulgated by the Administrator define the type and specificity of the notice required. 40 C.F.R. §135.3(A) (1979).

The district court held that the notice provision of section 505(b) was a jurisdictional prerequisite to suit, such that plaintiffs' failure to give notice barred suit under section 505(a), 33 U.S.C. §1365(a). This court has rejected the theory that substantial compliance with the notice requirement suffices to give the court jurisdiction under section 505(a). We require instead strict adherence to the Act's notice provisions for suits brought pursuant to section 505(a). *Loveladies Property Owners Ass'n.* v. *Raab,* 430 F. Supp. 276, 280-81 (D.N.J. 1975), *aff'd mem.,* 457 F.2d 1162 (3d Cir. 1976), *cert. denied,* 432 U.S. 906 (1977). We do not depart from that holding. We note, however, that it would be entirely permissible for this court to adopt the pragmatic approach to interpreting the 60-day notice provision by which we would merely require that sixty days elapse prior to district

---

[2] Numerous environmental protection statutes contain citizens' suit provisions, each of which also contains a notice requirement similar to that found in section 505(b), 33 U.S.C. §1365(b). *E.g.,* Toxic Substances Control Act, §§20, 21, 15 U.S.C. §§2619, 2620 (1976); Surface Mining Control and Reclamation Act of 1977, §520, 30 U.S.C. §1270 (1976 & Supp. I); Marine Protection, Research and Sanctuaries Act of 1972, §105, 33 U.S.C. §1415 (1976); Deepwater Port Act of 1974, §16, 33 U.S.C. §1515 (1976); Safe Drinking Water Act, §2(a), 42 U.S.C. §300j-8 (1976 & Supp I); Noise Control Act of 1972, §12, 42 U.S.C. §4911 (1976); Resource Conservation and Recovery Act of 1976, §2, 42 U.S.C. §6972 (1976 & Supp. I); Clean Air Amendments of 1970, §12(a), 42 U.S.C. §7604 (1976 & Supp. I).

court action on the complaint.[3] The purpose behind the notice provision, as the legislative history makes clear, was to afford the Environmental Protection Agency an opportunity to remedy the alleged violation prior to judicial action.[4] Thus, in the instant case, we could adopt the position that the failure of the Administrator to take remedial action during the sixty days after receiving notice of the suit permitted the suit to go forward in district court. We need not pass upon this proposition, however, because of our analysis of the independent significance of section 505(e), 33 U.S.C. §1365(e), the savings clause of the citizens' suit provision.

The district court erred in holding that failure to comply with section 505(b), 33 U.S.C. §1365(b), created an absolute bar to plaintiffs' suit to enforce the provisions of the Act. The citizens' suit provision of the FWPCAA was modeled on a similar provision in the Clean Act Act. *Compare* Clean Air Act §304, 42 U.S.C. §7604 (1976) *with* Federal Water Pollution Control Act §505, 33 U.S.C. §1365

---

[3] *See* H.R. Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. 145-46 (1972), reprinted in *Legislative History of the Water Pollution Control Act Amendments of 1972*, at 328-29 (1973) (hereinafter *Legislative History*) (Senate version, adopted in relevant part by Conference Committee, would require that "no action on a suit may begin for 60 days following notification"). Thus, it appears that the Senate bill envisioned filing of a Complaint prior to the passage of 60 days and intended only to defer action on such a suit.

[4] S. Rep. No. 92-414, 92d Cong., 1st Sess. 79-80 (1972), *reprinted in Legislative History* at 1497-98, *see* W. Rodgers, Environmental Law §1.13 (1976) (discussing prototype citizens' suit provision of Clean Air Act).

(1976 & Supp. I). The slight difference in wording of the citizens' suit provision of each act reflects only the attempt by Congress to ensure that the FWPCAA would comply with the holding of the Supreme Court in the then-recent case of *Sierra Club* v. *Morton,* 405 U.S. 727 (1972).[5] The Senate version of the bill would have permitted any person to sue to enforce the terms of the Act.[6] The House bill would have limited citizens' suits narrowly to suits brought by two types of plaintiffs, citizens of the geographic area who were directly affected by the alleged violation, or groups of persons who, because actively engaged in the administrative process, had shown an interest in

---

[5] In *Sierra Club,* the Supreme Court analyzed the requirement of standing in the context of litigation by environmental groups pursuant to section 10 of the Administrative Procedure Act. 5 U.S.C. §702 (1976). The Court held that such an environmental group would have standing if it could allege an adverse effect on its interests, whether economic, aesthetic, conservational or recreational. 405 U.S. at 738. The legislative history of the FWPCAA is replete with references to the *Sierra Club* decision and the issue of whether the general language of the Clean Air Act's citizens' suit provision would withstand judicial scrutiny. *See* notes 8-9 *infra* and accompanying text.

[6] The Senate bill provided that "any person" could commence a civil action to enforce the terms of the Act "without regard to the amount in controversy or the citizenship of the parties." S. 2770, 92d Cong., 1st Sess. §505(a)(1971), *reprinted in Legislative History* at 1703-04. The accompanying committee report likewise employed broad phrasing. *See* S. Rep. No. 92-414, 92d Cong., 1st Sess. 79 (1971), *reprinted in Legislative History* at 1497 ("anyone may initiate a civil suit against" specified parties for specific violations).

the area or the controversy.[7] The Conference Committee chose a middle path, limiting the section 505(a) remedy to citizens, but defining citizen broadly in section 505(g).[8] The intent of Congress was thus to provide generally for citizens' suits which would not be subject to the jurisdictional amount requirement and yet would provide for pri-

---

[7] The House bill provided

> Sec. 505.(a) . . . any citizen may commence a civil action on his own behalf . . .
>
> (g) For the purposes of this section the term 'citizen' means (1) a citizen (A) of the geographic area and (B) having a direct interest which is or may be affected, and
>
> (2) any group of persons which has been actively engaged in the administrative process and has thereby shown a special interest in the geographic area in controversy.

H.R. 11896, 92d Cong., 2d Sess. §§505(a), 505(g) (1972), *reprinted in Legislative History* at 1073, 1077.

[8] The final form of the bill reflects the Conference Committee's changes. *See* 33 U.S.C. §1365(g). The Conference Report notes that the change complies with the *Sierra Club* requirements. S. Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. 145-46 (1972), *reprinted in Legislative History* at 328-29. Senator Muskie's somewhat fuller description of the Conference agreement noted that:

> The Conference agreed to define a citizen, for purposes of the citizen suit section of the water bill, as a "person or persons having an interest which is or may be adversely affected."

1 *Legislative History* at 179 (prepared statement of Sen. Muskie) (Oct. 4, 1972).

vate attorney general enforcement to the maximum degree permitted by the Court's *Sierra Club* decision.[9]

It is clear, however, from the legislative history that the section 505(a) remedy is not exclusive. That section was intended to give federal courts jurisdiction over suits by private atorneys general seeking to enforce the provisions of the Act. Thus, the notice provision of section 505(b) only applies when a non-injured member of the public sues to enforce the Act. For the purposes of such a suit, Congress created the section 505(a) remedy, permitting suit not subject to the normally required minimum jurisdictional amount. *See* W. Rodgers, Environmental Law §1.13 (1977) (discussing prototype citizens' suit provisions of Clean Air Act). The section 505(a) remedy, however, is not the exclusive vehicle for enforcement of the FWPCAA by private citizens. A private

---

[9] The legislative history reveals numerous examples of this intent of Congress. *E.g.*, S. Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. 145-46 (1972), *reprinted in Legislative History* at 328-29; 118 Cong. Rec. 33752, *reprinted in Legislative History* at 179 (prepared statement of Sen. Muskie) (Oct. 4, 1972); 118 Cong. Rec. 33756, *reprinted in Legislative History* at 249-50 (remarks of Rep. Dingell) (Oct. 4, 1972). Moreover, although the passage of the House version preceded the *Sierra Club* decision, some representatives argued that the private attorney general theory intended to be adopted called for wording of the section identical to that found in the Clean Air Act. H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 407-09, *reprinted in Legislative History* at 876-78 (additional views of Rep. Bella S. Abzug and Rep. Charles B. Rangel) (describing House version as unnecessarily limited); 118 Cong. Rec. 10771-72, *reprinted in Legislative History* at 671-73 (remarks of Rep. McCloskey) (Mar. 29, 1972) (offering amendment similar to that ultimately adopted at Conference); *see* H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 133-34, *reprinted in Legislative History* at 820-21 endorsing private attorneys general concept).

party who is injured by the alleged violation, as these plantiffs allege they were, has an alternate basis for suit under section 505(e), 33 U.S.C. §1365(e), and the general federal question jurisdiction of the Judicial Code. 28 U.S.C. §1331 (1976). Section 505(e) is a savings clause that preserves all rights to enforce the Act or seek relief against the Administrator.[10] Coupled with the general federal question jurisdiction it permits this suit to be brought by the parties.[11] Moreover, unlike the private attorneys general provision of section 505(a), section 505(e) provides an independent remedy for injured parties unburdened by the notice requirements of section 505(b).

All parties and the court below acknowledge that the federal courts differ on the issue of whether section 505(e) authorizes private enforcement of the Act alternate to that authorized in section 505(a). The more persuasively reasoned cases, however, support our conclusion that section 505(e) was intended to preserve the rights of injured parties to sue to enforce the terms of the Act notwithstanding the expansion of remedies to non-injured parties

---

[10] Section 505(e) provides:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

33 U.S.C. §1365(e).

[11] Under the section 505(e) and 28 U.S.C. §1331 analysis, the plaintiffs, of course, remain subject to the jurisdictional amount requirement except with respect to their claim for injunctive relief against federal officers.

contained in section 505(a). They recognized that the effect of section 505(a) is to give the district court jurisdiction over a new class of plaintiffs, while section 505(e) preserves jurisdiction over the pre-existing right of injured parties to sue to enforce the Act.[12] By relying on the Clean Air Act, Congress made clear its intention to involve citizens in the enforcement of the Act.

The Second Circuit, in an opinion written by Judge Adams of this court sitting by designation, relied upon the Act's legislative history to support its conclusion that

---

[12] *Natural Resources Defense Council, Inc.* v. *Train,* 510 F.2d 692, 699-700 (D.C. Cir. 1974); *see Natural Resources Defense Council* v. *Callaway,* 524 F.2d 79, 83-84 (2d Cir. 1975) (60-day notice provision is not absolute bar to suit); *Conservation Soc'y of S. Vt., Inc.* v. *Sec'y of Transp.,* 508 F.2d 927, 938 & n.61, 938-39 (2d Cir. 1974) (same; provision intended to create additional remedy), *vacated,* 423 U.S. 809 (1975) (vacated and remanded for consideration of effect of statutory amendments on issue of preparation of environmental impact statement); *Township of Long Beach* v. *City of New York,* 445 F. Supp. 1203, 1208-10 (D.N.J. 1978) (finding jurisdiction under 28 U.S.C. §1331 gives effect to savings clause).

We therefore decline to follow the Seventh Circuit's opinion in *City of Highland Park* v. *Train,* 519 F.2d 681, 690-91 (7th Cir. 1975), on which the district court relied. The *Highland Park* court's strict reading of the 60-day notice requirement of the Clean Air Act's citizens' suit provision does not persuade us with respect to our savings clause analysis. *See id.* at 693 (rejecting Clean Air Act citizens' suit provision's savings clause analysis); *cf. West Penn Power Co.* v. *Train,* 522 F.2d 302, 307 & n.20 (3d Cir. 1975) (district court's literal reading of Clean Air Act's 60-day notice requirement not raised on appeal). We recognize instead the intent of Congress to create a remedy for a new class of plaintiffs while preserving in section505(e)those preexisting rights of injured individuals to enforce the Act.

failure to give notice was not an absolute bar to suit under the FWPCAA.[13] Moreover, prior to the district court's opinion in the instant matter, Chief Judge Clarkson Fisher had adopted the section 505(e) jurisdiction analysis as well. In *Township of Long Beach* v. *City of New York,* 445 F. Supp. 1203 (D.N.J. 1978), Chief Judge Fisher held that plaintiffs who had failed to comply with the section 505(b) notice requirement could sue in district court under section 505(e) and the general federal question jurisdiction, because they were injured parties suing on their own behalf and alleged damage in excess of the normal jurisdictional amount. *Id.* at 1209-10.[14] We must therefore reverse the holding of the district court that it lacked jurisdiction to entertain plaintiffs' claims under the FWPCAA.

We turn now to the issue of whether plaintiffs have a cause of action independent of that created in section 505(a) on which they may bring suit under section 505(e).

---

[13] *Conservation Soc'y of S. Vt.* v. *Sec'y. of Transp.,* 508 F.2d 927, 938 & n.62, 938-39 (2d Cir. 1974) (§ 1365(b) absolute bar analysis is "crabbed construction . . . which . . . fails to account for § 1365(e)"), *vacated,* 423 U.S. 809 (1975) (vacated for consideration of statutory issue of preparation of environmental impact statement). The court assumed arguendo that it had section 505(e) jurisdiction but denied relief on the merits. *Id.*

[14] Nor does our affirmance of the *Loveladies* decision bar today's holding. *See Loveladies Property Owners Ass'n* v. *Raab,* 430 F. Supp. 276, 280-81 (D.N.J. 1975), *aff'd mem.,* 457 F.2d 1162 (3d Cir. 1976) (failure to give notice bars suit under §505(a)), *cert. denied,* 432 U.S. 906 (1977). As Chief Judge Fisher noted in *Township of Long Beach,* the section 505(e) argument was not raised in *Loveladies,* and it is questionable whether the plaintiff there had suffered damage in excess of the required $10,000 amount. *See Township of Long Beach* v. *City of New York,* 445 F. Supp. at 1209 n.8.

In *Cort* v. *Ash,* 422 U.S. 66 (1975), the Supreme Court established a four part test for finding an implied private cause of action.[15] Since *Cort,* the Supreme Court has further refined the test to be applied in determining whether a private right of action arises under any given federal statute.[16] In *Cannon* v. *University of Chicago,* 441 U.S. 677 (1979), the Court broadened the *Cort* test and held that Congress' failure expressly to consider private remedies did not preclude a holding that Congress intended to imply one. *Id.* at 694. More recently, in *Touche Ross & Co.* v. *Redington,* —— U.S. ——, No. 78-309 (U.S. June 18, 1979), the Court noted that the *Cort* factors are merely relevant to the inquiry of whether a private remedy is implicit. *Id.* at ——, slip op. at 15. There, the Court stated that in *Cort* v. *Ash,*

---

[15] 422 U.S. at 78. The factors referred to in *Cort* are:

> First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with 'the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. (emphasis in original).

[16] *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* —— U.S. ——, No. 77-1645 (U.S. Nov. 13, 1979); *Touche Ross & Co.* v. *Redington,* —— U.S. ——, No. 78-309 (U.S. June 18, 1979); *Cannon* v. *University of Chicago,* 441 U.S. 677 (1979).

> the Court did not decide that each of these factors is entitled to equal weight. *The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action.*

Id. (emphasis added). Thus, the Court noted, the *Cort* factors are simply designed to guide the courts in determining legislative intent. Finally, this Term in *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* —— U.S. ——, No. 77-1645 (U.S. Nov. 13, 1979), the Court applied the *Touche Ross* test, noting that the issue of "whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction." *Id.* at ——, slip op. at 4. It held that once legislative intent is discovered, countervailing considertion arising from strict application of the *Cort* factors become irrelevant. *Id.* at ——, slip op. at 11-12. Bearing in mind that the single relevant inquiry is the intent of Congress, we turn to the *Cort* v. *Ash* factors to guide our analysis of the legislative intent.

Applying these factors to the instant case, we hold that a private cause of action is available to these plaintiffs under the FWPCAA.[17] First, we have already held that one of the purposes behind the passage of the FWPCAA was the protection of individuals from injury caused by

---

[17] We have already held that the district court had jurisdiction to entertain plaintiffs' suit pursuant to section 505(e) of the Act, 33 U.S.C. §1365(e), and the general federal question jurisdiction, 28 U.S.C. §1331. Separate analysis of jurisdiction and the merits of the cause of action is required by cases such as *Bell* v. *Hood,* 327 U.S. 678 (1946), and *Bivens* v. *Six Unknown Named Agents of the Fed. Bur. of Narcotics,* 403 U.S. 388 (1971).

the polluting activities of others. Thus, although the Act specifically grants a remedy to non-injured persons suing on behalf of the public, it is clear that the "class for whose *especial* benefit the statute was enacted" must have been individuals likely to suffer actual injury by the pollution.[18] Jurisdiction over suits by them is preserved by the savings clause. Although section 505(a) of the Act permits suit by private attorneys general who have suffered no direct economic harm, the statute clearly was intended to protect this particular class of actually injured persons as well. Plaintiffs are members of a class that takes its living from the sea and that is especially hurt by pollution. The general purpose clause of the Act includes a statement that the national goal shall be the attainment of that "water quality which provides for the protection and progagation of the fish, shellfish, and wildlife." 33 U.S.C. §1251(a)(2). Although such protection will of course benefit the public at large, the general purpose clause supports our conclusion that the statute was intended to benefit the class of which plaintiffs are a part, and that a private remedy was intended to be created in their behalf.

As to the second factor in the *Cort* analysis, nothing in the legislative history suggests that the section 505(a) remedy created on behalf of private attorneys general was intended to be exclusive. Indeed, the savings clause broadly preserves all rights to sue "under any statute," language which given the legislative history of the section supports the existence of alternate remedies under

---

[18] In *Cannon,* the Court looked to the language of the statute to identify the class intended to be benefitted by the legislation, contrasting such a statute with those intended to benefit the public at large. *Cannon* v. *Univ. of Chicago,* 441 U.S. 677, 690 (1979).

the Act.[19] We reject the argument that the legislative history precludes finding an implied private right of action under the FWPCAA. The Report that accompanied the Senate's original version of the bill noted that the savings clause preserved the rights to sue "under any other law." S. Rep. No. 92-414 at 81, *Legislative History* at 1499.[20] We are not persuaded that this paraphrase of the wording of the Act was intended to preclude the finding of a private remedy under the Act. The wording of the savings clause itself makes clear Congress' intent to preserve the rights of individuals to sue under *any* statute or the common law.

The third *Cort* factor was expanded by the Supreme Court last Term in *Cannon*. There the Court noted that

> when [a private right of action] remedy is necessary or at least helpful to the accomplishment of the purpose the court is decidedly receptive to its implication under the statute.

---

[19] We are not persuaded that exclusivity of the section 505(a) remedy is supported by the Senate's rejection of a class action mechanism. S. Rep. No. 92-414 at 81, *Legislative History* at 1499 (§505 does not authorize class actions; intended to avoid Fed. R. Civ. P. 23 problems); *see City of Evansville* v. *Ky. Liquid Recycling*, 604 F.2d 1008, 1014 (7th Cir. 1979) (§505 does not authorize class action or suit for damages).

[20] The Seventh Circuit, addressing the issue of whether there was an implied private cause of action for damages under the FWPCAA, was persuaded that the Senate Report evidenced Congress' intent that no remedy other than that provided for in section 505(a) be implied from the FWPCAA. *City of Evansville* v. *Ky. Liq. Recycling, Inc.*, 604 F.2d 1008, 1018-19 (7th Cir. 1979). We are not persuaded that the language of the Senate Report establishes that the savings clause precludes finding an implied private cause of action under the Act on behalf of these plaintiffs.

441 U.S. at 703. Although not necessary to the accomplishment of the purposes of the FWPCAA, implying a private remedy on behalf of these plaintiffs certainly would be "helpful" to the effectuation of those purposes. Moreover, under the *Cort* analysis, a private remedy would be consistent with the purposes of the Act in general and with the purpose of protecting and encouraging propagation of marine life in particular. *See* 33 U.S.C. §1251(a)(2) (general purpose clause).

Finally, the fourth inquiry in the *Cort* analysis also points to Congress' intent to permit this private cause of action. Far from being an area of traditional state concern, water pollution of the Atlantic Ocean is an interstate phenomenon of federal concern as to which an implied private remedy in the federal courts should not be denied.[21]

Thus, using the *Cort* factors as a guide, we have examined the statute and its legislative history in order to discover the legislative intent. *See Transamerica Mortgage Advisors, Inc.* v. *Lewis,* ——U.S. ——, No. 77-1645, slip op. at 4 (Nov. 13, 1979). We therefore hold that Congress intended to permit the federal courts to entertain a private cause of action implied from the terms of the FWPCAA, preserved by the savings clause of the Act, on behalf of individuals or groups of individuals who

---

[21] In *Illinois* v. *Milwaukee,* 406 U.S. 91 (1972), a unanimous Supreme Court recognized that there is a federal common law cause of action to abate pollution of interstate ambient water notwithstanding the relief available under the FWPCAA. *Id.* at 103-05. In Part IV, *infra,* we address this reliance on the federal common law of nuisance in the water pollution context.

have been or will be injured by pollution in violation of its terms.

Having so held, we reject the federal government defendants' sovereign immunity argument. The 1976 amendments to section 1331 of title 28 make clear that sovereign immunity has been waived in all suits by plaintiffs seeking injunctive relief against federal agencies or officers.[22] Whether damages can be recovered from the federal government is a separate question to which the Federal Tort Claims Act speaks. *See* Part VII, *infra*. We must therefore reverse the district court's dismissal of the FWPCAA claims.

II. *The Marine Protection, Research & Santuaries Act*

The Marine Protection, Research & Sanctuaries Act, 33 U.S.C. § 1401-1444 (1976) (MPRSA or Ocean Dumping Act) regulates the transporting and dumping of certain material into the open waters of the ocean. *Id.* § 1401. The Act defines the prohibited material to include dredged material, solid waste, sewage and sewage sludge,[23] and provides for an absolute cessation of dumping of

---

[22] *See* Act of October 21, 1976, Pub. L. No. 94-574, *currently codified at* 5 U.S.C. §§702, 703 (1976) and 28 U.S.C. §§1331, 1391 (1976).

[23] 33 U.S.C. §1402(b). The Act also defines "ocean waters" as "those waters of the open seas lying seaward of the base line from which the territorial sea is measured." *Id.* §1402(c). The Act does not apply to outfall structures regulated by the FWPCAA or the Refuse Act. *Id.* §1402(f).

sewage sludge by December 31, 1981.[24] Plaintiffs alleged four separate violations of the MPRSA,[25] all of which were dismissed on the ground that plaintiffs' failure to give notice barred suit in district court.

Like the FWPCAA, the MPRSA provides that citizens' suits may be brought after giving 60 days' notice[26] and contains a savings clause preserving all other rights to

---

[24] *Id.* §1412a(a) (1976 & Supp. I). The Act defines sewage sludge to include

> any solid, semisolid, or liquid waste generated by a municipal waste water treatment plant the ocean dumping of which may unreasonably degrade or endanger human health, welfare, amenities, or the marine environment, ecological systems, or economic potentialities.

Id. §1412a(b).

[25] Count I of the Complaint alleged that federal defendants Environmental Protection Agency (EPA) and Army Corps of Engineers (ACE) failed to enforce the provisions of the Act, that the Secretary of the Army and the ACE negligently conducted dredging and dumping operations, and that the state defendants transported and dumped sewage in violation of the Act. Count III alleged that EPA and the Administrator of EPA and ACE and the Secretary of the Army failed to carry out their duties under the Act.

[26] The citizens' suit section of the MPRSA, 33 U.S.C. §1415(g), provides in relevant part that, subject to the notice requirement, *id.* §1415(g)(2), "any person may commence a civil suit on his own behalf to enjoin any person" acting in violation of the terms of the Act. *Id.* Other limitations upon the instituting of citizens' suits are directed toward the avoidance of duplicative litigation and are not relevant to this suit. *See id.* §1415(g)(2).

seek relief.[27] Although the wording of the citizens' suit provision of the MPRSA differs slightly from the FWP CAA provision, the jurisdictional analysis is the same.[28] Thus, because these plaintiffs have not complied with the notice requirement of the citizens' suit provision, their suit under section 1415(g)(1), which governs private attorney general suits by non-injured persons, is barred. However, because they allege that they have suffered direct injury by virtue of the defendants' violations of the Act, jurisdiction over their suit to enforce the provisions of the MPRSA is preserved by the savings clause. Moreover, a private cause of action to enforce the terms of the Act may be implied with respect to these injured plaintiffs. For the purposes of this analysis, the statutory provisions and legislative histories of the MPRSA and FWPCAA are virtually indistinguishable.[29] Thus

---

[27] *Id.* §1415(g)(5). The savings clause provides

> (5) The injunctive relief provided by this subsection shall not restrict any rights which any person (or class of persons may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other

Id.

[28] *Compare* 33 U.S.C. §1365(a) (any citizen may sue) *with id.* §1415(g)(2) (any person may sue). The legislative history of the MPRSA is less clear than that of the FWPCAA, although the citizens' suit provision appears to have been patterned on the Clear Air Act formulation, as was the provision found in the FW PCAA.

[29] Indeed, the MPRSA language, if anything, is broader than that of the FWPCAA. *See* Part I *supra* (legislative history and statutory analysis of FWPCAA). Other courts, including the dis-

(Footnote continued on following page)

we hold that the district court had jurisdiction to entertain this suit by these plaintiffs pursuant to the savings clause of the MPRSA and that a private cause of action to enforce the terms of the Act may be implied on behalf of these injured parties. We must therefore reverse the judgment of the district court dismissing the plaintiffs' MPRSA claims.

III. *The Rivers and Harbors Act (Refuse Act)*

Plaintiffs also allege that federal defendant Army Corps of Engineers (ACE) and the state defendants violated section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 (1976) (The Refuse Act). The Refuse Act makes it unlawful to discharge or permit to be discharged "any refuse matter of any kind or description whatever other than that flowing from streets and sewers into any navigable water of the United States or any tributary thereof." *Id.* The district court dismissed this part of the complaint. We affirm.

The Rivers and Harbors Act is limited by its terms to enforcement by the United States Attorneys. 33 U.S.C. § 413 (1976). The majority of courts, and the courts of this circuit that have addressed this issue, have held that the Act precludes private suits and have thus refused to

---

(Footnote continued from preceding page)

trict court which ruled on this case do not analyze the MPRSA and FWPCAA separately, holding that the Acts are virtually identical in this regard. *E.g., Township of Long Beach* v. *City of New York*, 445 F. Supp. 1203, 1210-11 (D.N.J. 1978); *Save Our Sound Fisheries Ass'n* v. *Callaway (SOSF II)*, 429 F. Supp. 1136, 1140-42 (D.R.I. 1977).

find an implied private cause of action. *Red Star Towing & Transp. Co.* v. *Dept. of Transp.*, 423 F.2d 104, 105 (3d Cir. 1970) (Act enforced by penal sanctions only); *Township of Long Beach* v. *City of New York*, 445 F Supp. 1203, 1211-12 (D.N.J. 1978) (rejecting private cause of action); *see Connecticut Action Now, Inc.* v. *Roberts Plating Co.*, 457 F.2d 81, 85-87 (2d Cir. 1972) (§ 413 delegates enforcement to Department of Justice; private party may not force prosecution under § 407); *Parsell* v. *Shell Oil Co.*, 421 F. Supp. 1275, 1279-80 (D. Conn. 1976) (Act protects public at large rather than private group of individuals), *aff'd mem. sub nom. East End Yacht Club, Inc.* v. *Shell Oil Co.*, 573 F.2d 1289 (2d Cir. 1977); *Anderson* v. *Norfolk & Western Ry.*, 349 F. Supp. 121, 122 (W.D. Va. 1972) (§ 413 delegates enforcement to United States Attorneys; Act precludes *qui tam* enforcement). We adhere to the view that enforcement of the Refuse Act is limited to action by the United States Attorneys.[30] There-

---

[30] We reject the argument that the court should imply a private cause of action in cases in which the United States Attorney is not in a position to enforce the terms of the Act. *See NRDC* v. *Grant*, 355 F. Supp. 280, 290 (E.D.N.C. 1973) (finding private cause of action because U.S. Attorney serving as counsel for defendants). The *NDRC* v. *Grant* decision, finding an implied private cause of action because the United States Attorney was involved as counsel for the federal government defendants, does not persuade us that a private remedy should be implied. That decision was based upon an analogy to two provisions of the Rivers and Harbors Act which have generally been interpreted to permit a private cause of action. *Id.* The argument that the conflicting enforcement and defense roles of the United States Attorney support the implied private remedy has been explicitly rejected by this court. *Red Star*

(Footnote continued on following page)

fore the dismissal of plaintiffs' refuse Act claims must be affirmed.

IV. *The Federal Common Law of Nuisance*

In *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), a unanimous Supreme Court recognized that there is a federal common law cause of action to abate polluition of interstate ambient water, notwithstanding any relief available under the FWPCAA[31] and held that such a cause

---

(Footnote continued from preceding page)

Towing & Transp. Co. v. *Dept. of Transp.*, 423 F.2d 104, 105 (3d Cir. 1970); *see Township of Long Beach* v. *City of New York*, 445 F. Supp. 1203, 1211-12 (D.N.J. 1978) (no private remedy even if federal government is defendant; rejecting *Grant* analysis); *Loveladies Property Owners Ass'n* v. *Raab*, 430 F. Supp. 276, 281 (D.N.J. 1975) (no implied private remedy under §407; relying on *Red Star Towing*), *aff'd mem.* 547 F.2d 1162 (3d Cir. 1976), *cert. denied*, 432 U.S. 906 (1977).

[31] 406 U.S. at 103-05. The court held that the relief available under the FWPCAA is not an exclusive remedy. *Id.* at 104. In the private enforcement context, this holding probably is statutorily compelled. The FWPCAA provides for injunctive relief and the assessment of civil penalties, but does not create a cause of action for damages. The savings clause of the citizens' suit provision, which preserves all rights of litigants to sue under any statute or common law, has the effect of preserving these plaintiffs' rights to sue for damages under the remedy created in *Illinois* v. *City of Milwaukee*. *See* 33 U.S.C. §1365(e).

Since *Illinois* v. *City of Milwaukee* was decided, the FWPCAA has been amended twice, but these amendments do not suggest that Congress intended to preempt the federal nuisance remedy. The Seventh Circuit, in deciding an appeal from the remand of

(Footnote continued on following page)

of action presented a federal question over which the district courts had section 1331 jurisdiction.[32] The district court refused to extend the cause of action to private litigants and dismissed plaintiffs' common law nuisance claim. In so holding, the court relied on holdings by other federal district courts that only governmental agencies can sue for relief from a public nuisance.[33] We hold that

---

(Footnote continued from preceding page)

the *Illinois* case, analyzed the amended act to permit a claim for nuisance independent of the FWPCAA remedies. *Illinois* v. *City of Milwaukee,* 599 F.2d 151, 162 (7th Cir. 1979) (Act "suggests, if it does not require, the conclusion that Congress did not intend to preempt the federal common law of nuisance"), *petition for cert. filed,* 48 U.S.L.W. 3155 (U.S. Sep. 11, 1979) (No. 79-408); *see* 33 U.S.C. §1370 (state authority to enforce more stringent limitations); *id.* §1371 (chapter shall not be construed to limit or impair authority of officers or agencies). Moreover, the Seventh Circuit relied upon the explicit language of the savings clause in reaching that conclusion. That clause preserves all remedies under "any statute or common law." 33 U.S.C. §1365(e); *see* S. Rep. No. 93-414 at 81 *reprinted in Legislative History* at 1499 ("Compliance with [the] . . . Act would not be a defense to a common law nuisance action for damages."). There is no suggestion that "common law" was intended to be limited to state rather than federal common law. We thus agree that the amended Act does not preclude an independent nuisance remedy.

[32] 406 U.S. at 105; 28 U.S.C. §1331 (1976); *see Illinois* v. *City of Milwaukee,* 599 F.2d 151, 162-63 (7th Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3155 (U.S. Sep. 11, 1979) (No. 79-408).

[33] *See Parsell* v. *Shell Oil Co.,* 421 F. Supp. 1275, 1281 (D. Conn. 1976), *aff'd mem. sub nom., East End Yacht Club Inc.* v. *Shell Oil Co.,* 573 F.2d 1289 (2d Cir. 1977); *Committee for Consid. of Jones Falls Sew. Sys.* v. *Train,* 375 F. Supp. 1148 (D. Md. 1974), *aff'd on different but not inconsistent grounds,* 539 F.2d 1006 (4th Cir. 1976).

the common law nuisance remedy recognized in *Illinois* v. *City of Milwaukee* is available in suits by private parties.

The Court stated explicitly in *Illinois* that although both parties to that suit were governmental, "it is not only the character of the parties that requires us to apply federal law." *Illinois* v. *City of Milwaukee,* 406 U.S. at 105 n.6. Rather, the Court noted that "where there is an overriding federal interest in the need for a uniform rule of decision . . . we have fashioned federal common law." *Id.* In the instant case, plaintiffs are suing for damages to interstate ambient water, an issue as to which there is a clear and overriding federal interest in uniformity.[34] There is no question but that the interstate pollution here alleged is a problem calling for the application of a uniform federal standard. Relegating these litigants to possibly conflicting New York and New Jersey nuisance standards would ignore the clear intent of the Supreme Court to federalize those standards and would undermine that federal uniformity. These plaintiffs have sufficiently alleged pollution of interstate waters.[35] In order to give

[34] In reaching the conclusion that federal common law may be fashioned to deal with federal rights, and that ambient air or water are interstate problems as to which there is a federal common law remedy, the Supreme Court relied upon *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 457 (1957) and *Texas* v. *Pankey,* 441 F.2d 236, 240-41 (10th Cir. 1971). *Illinois* v. *City of Milwaukee,* 406 U.S. at 103 & n.5.

[35] Failure sufficiently to allege interstate effects has proved fatal to plaintiffs seeking to base their suits on the federal common law nuisance remedy. *Reserve Mining Co.* v. *EPA,* 514 F.2d 492, 520 (8th Cir. 1975); *Committee for Consid. of Jones Falls Sew.*

(Footnote continued on following page)

full effect to the federal common law of nuisance recognized in *Illinois*, private parties should be permitted, and indeed encouraged, to participate in the abatement of such nuisances. Courts have already extended the *Illinois* remedy to the federal government[36] and to municipalities,[37] and one district court has applied it on behalf of private litigants.[38] The effectuation of the purposes of the *Illi-*

(Footnote continued from preceding page)

Sys. v. *Train*, 539 F.2d 1006, 1009 (4th Cir. 1976). In *Illinois* v. *City of Milwaukee*, the immediate issue of concern was the need to apply uniform federal law where the polluting activities of one state caused harm to another state. The need for uniformity, however, is no less a concern where individuals are harmed by the polluting activities of states or their subdivisions. To hold that plaintiffs may not avail themselves of this remedy is to leave open the possibility that this pollution will continue unabated and that the damages suffered by these individuals will be unremedied. Such result was surely not intended by the unanimous Court in *Illinois* v. *City of Milwaukee*.

[36] *United States* v. *Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); *United States* v. *Ira S. Bushey & Sons*, 346 F. Supp. 145, 149-50 (D. Vt. 1972), *aff'd mem.*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974).

[37] *City of Evansville* v. *Ky. Liq. Recycling, Inc.*, 604 F.2d 1008, 1018-19 (7th Cir. 1979).

[38] In *Byram River* v. *Village of Port Chester*, 394 F. Supp. 618 (S.D.N.Y. 1975), the court extended the *Illinois* v. *City of Milwaukee* remedy to (1) Byram River, (2) a private corporation, Byram River Pollution Abatement Association, (3) the Town of Greenwich, a municipal corporation, and (4) a private individual owning land on the river's bank. *Id.* at 622 (relying on *Illinois* v. *City of Milwaukee* and 28 U.S.C. §1331).

(Footnote continued on following page)

nois v. *City of Milwaukee* remedy and the fulfillment of the Supreme Court's intent in creating that remedy lead us to conclude that it is available to these private litigants who have been injured by the effects of the polluting activities of these defendants. While *Illinois* v. *City of Milwaukee* did not address this specific issue, we are convinced that the Court would apply the mode of analysis of *Lincoln Mills*[39] and would look to the Restatement formulation as an appropriate source for a federal rule. These plaintiffs have alleged sufficient individual damage to permit them to recover damages for this essentially

---

(Footnote continued from preceding page)

In *Stream Pollution Control Board* v. *United States Steel Corp.*, 512 F.2d 1036 (7th Cir. 1975), the Seventh Circuit held that common law relief is available to a pollution control board, but denied the motion of a private individual to intervene on the ground that the federal common law nuisance suit was not a suit commenced to enforce compliance with an FWPCAA "standard, limitation or order." *Id.* at 1039-41, 1040 n.9; *see* 33 U.S.C. §1365(b)(1)(B) (governing intervention). The court did not address the availability of the *Illinois* remedy to a private individual, but held that the remedy extended to the pollution control board because the "complaint raises substantial questions which only a federal court may finally answer." 512 F.2d at 1040. Although the Seventh Circuit has since questioned the analysis of the FWPCAA permit system in *Stream Pollution, see United States Steel Corp.* v. *Train*, 356 F.2d 822, 830 n.3 (7th Cir. 1977), that affects only the issue of whether under the Act, the private individual could intervene. In *Potomac River Association* v. *Lundeberg Md. Seamanship School*, 402 F. Supp. 344 (D. Md. 1975), the court permitted private plaintiffs to sue for the maritime tort of nuisance without reference to a federal common law nuisance claim. *Id.* at 358-59; *see* Part V, *infra.*

[39] *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957).

public nuisance. The Restatement (Second) of Torts defines a public nuisance as "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B (1979). A private party may recover damages for a public nuisance if, while exercising the common right, he has suffered damages different in kind from those suffered by the public. *Id.* § 821C. The Restatement for formulation encompasses the injury alleged in this case.[40] In *Burges* v. M/V TAMANO, 370 F. Supp. 247 (D. Me. 1973), the court held that

> it would be incongrous to say that a man engaged in commercial fishing or clamming, and dependent thereon for his livelihood, who may have had his business destroyed by the tortious acts of another should be denied any right to recover for his pecuniary loss on the ground that his injury is no different in kind from that sustained by the general public.

Id. at 250. Thus, these plaintiffs, who have a right under federal common law to abate the pollution of interstate waters, have also suffered sufficient individual harm to sue for damages arising from that public nuisance. We therefore hold that the federal common law of nuisance may be enforced by private plaintiffs and that these plain-

---

[40] Illustration 11, explicitly included within the different in kind test, is indistinguishable from the facts of this suit. It states:

> 11. A pollutes public waters, killing all of the fish. B. who has been operating a commercial fishery in these waters, suffers pecuniary loss as a result. B can recover for the public nuisance.

Restatement (Second) of Torts §821C, Illustration 11 (1979).

tiffs have sufficiently alleged individual harm to permit recovery of damages for the public nuisance. Thus we must reverse the trial court's dismissal of the plaintiffs' federal common law nuisance claim.

V. *Admiralty Jurisdiction and Maritime Torts*

Plaintiffs also listed the federal admiralty law as an alternate basis for their tort claims. *See* U.S. Const. art III, §2; 28 U.S.C. §1333 (1976); 46 U.S.C. §740 (1976). The Supreme Court's traditional test for the existence of admiralty jurisdiction is two-fold; first, the traditional element of a maritime locality must be established; and second, a signifıcant relationship to a traditional maritime activity must be proven. *Executive Jet Aviation, Inc.* v. *Cleveland,* 409 U.S. 249 (1972). The situs test may be no longer signfıcant. *See P.C. Pfeiffer Co.* v. *Ford,* —— U.S. ——, 48 U.S.L.W. 4018, 4019 (U.S. Nov. 27, 1979); *Sea-Land Serv.* v. *Director, Office of Workers' Compens.,* 540 F.2d 629, 635-39 (3d Cir. 1976). That need not concern us here for both elements are satisfied by the allegations of the complaint. The situs of the algal bloom was the high seas. The nexus to maritime commerce is plain. *See, e.g., Moore* v. *Hampton Roads Sanitation Dist. Comm'n,* 557 F.2d 1030, 1034 (4th Cir. 1976) (harvesting oysters and clams, like fishing, is traditional maritime activity meeting nexus test of *Executive Jet*), *cert. denied,* 434 U.S. 1012 (1978); *Union Oil Co.* v. *Oppen,* 501 F.2d 558, 561 (9th Cir. 1974) (fishing industry is part of maritime activity); *Potomac River Ass'n* v. *Lundeberg Md. Seamanship School,* 402 F. Supp. 344, 358 (D. Md. 1975) (injury to commercial fishing meets tests of *Executive Jet*). Thus, this suit by plaintiffs for the tort nuisance

committed in the navigable waters and injuring those engaged in maritime commerce falls within the admiralty jurisdiction of the district court.[41]

Having held that the district court had jurisdiction in admiralty over plaintiffs' claims, we turn to whether plaintiffs have sufficiently alleged a cause of action sounding in maritime tort. One district court has recognized that a suit by clammers and fishermen for damages caused by an oil spill sounded in maritime tort and that recovery could be had for damages suffered by private plaintiffs alleging tortious invasions different from those suffered by the general public. *Burgess* v. M/V TAMANO, 370 F. Supp. 247, 249-50 (D. Me. 1973). The court held that the pollution was an interference with plaintiffs' direct exercise of a public right to fish and dig for claims and thus caused them damages different in kind from those suffered by the general public. *Id.* at 250.

The district court dismissed this claim on the ground that plaintiffs' Complaint was insufficient to allege a cause of action sounding in maritime tort. To the extent that plaintiffs have attempted to allege a mariitme tort, it must be found in Count I of their Complaint. That Count seeks recovery based on a theory of federal common law nuis-

---

[41] We need not consider plaintiffs' assertion that the court had jurisdiction independently under the Extension of Admiralty Act, 46 U.S.C. §740 (1976). That Act was intended to broaden jurisdiction to cases over which jurisdiction would not have existed under the strict locality test employed prior to *Executive Jet*. The Act extends admiralty jurisdiction to injuries caused by a vessel on navigable waters the effects of which are felt on land.

ance, rather than alleging specifically a maritime tort.[42] But the facts which support a *Burgess*-type admiralty tort claim are sufficiently alleged, and thus judged by the standards applicable to motions under Fed. R. Civ. P. 12(b)(6) the Complaint is sufficient. Probably the substantive legal standards applicable to the maritime nuisance tort and the federal common law nuisance tort recognized in *Illinois* v. *City of Milwaukee* are the same, although on this record we need not fully explore that question. Nor need we decide whether the plaintiffs must at some point elect between admiralty and non-admiralty remedies. Finally, the district court did not, and thus we do not reach the question of whether the Limitation of Liability Act, 46 U.S.C. §§181-195 (1976), would be available to limit liability of the federal and municipal government defendants for damages to the value of the vessels used to barge the sewage and dredge spoils to the various dumping sites. We do hold that it was error to dismiss plaintiffs' maritime tort claims against all defendants at the pleading stage.

---

[42] The confusion arises because the nuisance claim also requires a showing that these private individuals have suffered damages different in kind from those suffered by the general public. *See* Part IV, *supra*. In *Burgess*, the court held that the tort of nuisance could be a maritime tort and analyzed the Complaint under an admiralty theory. *See* 370 F. Supp. at 250. The plaintiffs in *Burgess* did not raise, and the court did not address, the federal common law nuisance issue. Thus, the *Burgess* opinion does not persuade us that an allegation of the tort of nuisance as to which recovery is expressly based on the doctrine of federal common law nuisance may not also be liberally read as sounding in maritime tort.

VII. *Federal Tort Claims Act*

The district court held that the cause of action against federal agencies based on maritime tort was barred by plaintiffs' failure to comply with the requirements of the Federal Tort Claims Act, 28 U.S.C. §§2671-2680 (1976) (FTCA).[43] The terms of the FTCA define the limits of the Court's jurisdiction to hear suits brought pursuant to the Act. *United States* v. *Sherwood,* 312 U.S. 584, 586 (1941); *Rosario* v. *American Export Isbrandsten Lines,* 531 F.2d 1227, 1231 (3d Cir.), *cert. denied,* 429 U.S. 857 (1976). Under the Act, claims must first be presented to the appropriate federal agency and no suit may be filed until six months thereafter. 28 U.S.C. §2675. Regulations promulgated pursuant to the Act require that each claim so presented contain a demand for a sum certain. 28 C.F.R. §14.2 (1978). These requirements were intended to create a system of prelitigation administrative consideration in order to settle claims and avoid unnecessary litigation.[44] Plaintiffs failed to observe the six months' waiting period. The district court held and we agree that it did not have jurisdiction to entertain the plaintiffs'

---

[43] *See* 28 U.S.C. §2675 (six months must elapse following presentation of claim to federal agency before suit may be filed); 28 C.F.R. §14.2 (1978) (claim must demand sum certain in damages).

[44] *Bialowas* v. *United States,* 443 F.2d 1047, 1049-50 (3d Cir. 1971); *see Pennsylvania* v. *Nat'l Ass'n of Flood Insurers,* 520 F.2d 11, 19 (3d Cir. 1975) (sum certain requirement); *Ryan* v. *United States,* 457 F. Supp. 400, 402 (W.D. Pa. 1978) (same).

claims under the FTCA.[45] This precludes a money damage recovery against federal agencies based on state law. Since we are remanding the federal common law nuisance claim we leave open the question, not addressed by the parties to this appeal, whether absent a reference in some statute waiving sovereign immunity for federal common law torts, monetary relief against the federal defendants is unavailable.

VIII. *The National Environmental Policy Act (NEPA)*

The plaintiffs allege that the Environmental Protection Agency has violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4361 (1976 & Supp. I), by failing to develop, plan, and coordinate federal functions, programs, and resources to the end that the Atlantic Ocean might exist without degradation, and that those who use the marine environment would be protected from risk to health or safety or other undesirable consequences. The district court held that the complaint failed to state a cause of action under NEPA. The issue is one of considerable complexity. The preparation of an environmental impact statement is required for every "major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (1976). The Administrator of the Environmental Protection Agency, however, is statutorily exempt from the environ-

---

[45] We express no view as to whether the sum requested by plaintiffs was sufficiently certain, *see Fallon* v. *United States*, 405 F. Supp. 1320, 1322 (D. Mont. 1976), or whether plaintiffs' claims against federal agencies and officials for negligent enforcement of various federal acts would be barred by the FTCA's exception for discretionary functions. *See* 28 U.S.C. §2680(a) (1976).

mental impact statement requirement. 33 U.S.C. § 1371 (c)(1) (1976). Whether other substantive provisions of NEPA would afford relief is not entirely clear.[46] Further complicating the application of NEPA is the fact that some actions of the Agency are discretionary, 42 U.S.C. § 4331, and are reviewable only pursuant to the Administrative Proceduce Act, 5 U.S.C. § 706 (1976). *See Environmental Def. Fund* v. *Corps of Eng.*, 470 F.2d 289, 298 n. 14, 298-300 (8th Cir. 1972), *cert. denied,* 412 U.S. 931 (1973). Because it does not appear at this stage of the case that a cause of action based upon NEPA would afford to the plaintiffs and the class they seek to represent any relief different from or more extensive than the relief which would be available under the claims we have already discussed, we decline at this time to pass upon the merit of the rather complex issues posed by NEPA. The district court will be free to reconsider the NEPA contentions in the light of the record developed on remand.

IX. *State Tort Claims Acts*

Moreover, to the extent that plaintiffs also failed to comply with the requirements of the New Jersey[47] and

---

[46] Courts differ, for example, on the question of whether section 101 of NEPA, setting forth Congress' declaration of purpose, would afford such relief. *Compare Calvert Cliffs' Coord. Comm.* v. *AEC*, 449 F.2d 1109, 114 (D.C. Cir. 1971) (§101 of NEPA is substantive) *with Shifflin* v. *Schlesinger,* 548 F.2d 96, 100-01 (3d Cir. 1977) (§101 lacks independent substantive impact).

[47] New Jersey Tort Claims Act, N.J.S.A. 59:1-1 to 12-2 (1972). The statute provides that public entities may only be sued if a claim is presented within 90 days after the cause of action accrues and no court suit may be instituted prior to six months thereafter. *Id.* 59:8-8. The trial judge has discretion under the statute to expand the filing time from 90 days to one year if no substantive prejudice results. *Id.* 59:8-9.

New York[48] tort claims acts, the dismissal of their claims under those acts must be affirmed. We do so, however, without prejudice to present compliance with the requirements of those statutes and suit thereunder in the future.[49]

X. *Constitutional Claims*

Plaintiffs also alleged violation of their fifth, ninth, and fourteenth amendment rights. They argued that there is a constitutional right to a pollution-free environment and that, by virtue of their special relationship to the environment, they can enforce this right. The district court rejected the constitutional argument and we affirm that holding. It is established in this circuit and elsewhere that there is no constitutional right to a pollution-free environment. *See, e.g., Township of Long Beach* v. *City of New York,* 445 F. Supp. 1203, 1212-13 (D.N.J. 1978) (citing cases rejecting constitutional analysis). We hold that the district court properly rejected the plaintiff's constitutional claims.

---

[48] N.Y. General Municipal Law (McKinney) §50-e (1977). The statute provides that notice of a claim must be filed within 90 days after the cause of action accrues, *id.*, that suit may not be filed until 30 days have elapsed after the filing of the notice, *id.* §50-i(1), and that no suit may be brought more than one year and 90 days after the accrual of the cause of action. *Id.* §50-i(1)(c). A suit within the admiralty jurisdiction, however, is not subject to the requirements of the New York Tort Claims Act. *Rogers* v. *City of New York,* 259 N.Y.S.2d 604, 608-09 (N.Y. Sup. Ct. 1965).

[49] Plaintiffs' failure to comply with the requirements of the state tort claims statutes, however, only bars suit under those statutes. It does not preclude suit if an alternative basis for suit against the defendants is pleaded. The state tort claims acts may not preempt federal statutory or common law causes of action.

XI. *Other Contentions*

Defendants Passaic Valley Sewerage Commission (PVSC), Linden Roselle Sewerage Authority, and Middlesex County Sewerage Authority as separate grounds for affirmance plead that suits against them must be dismissed on eleventh amendment grounds. We reject that contention. These defendants are municipal corporations as to whom sovereign immunity under the eleventh amendment does not apply. *See* N.J.S.A. 40:14B-4 (1957); N.J.S.A. 58:14-2 (1957).

XII. *Conclusion*

The judgment dismissing the Complaint will be reversed to the extent that it dismissed plaintiffs' claims under the Federal Water Pollution Control Act, the Marine Protection, Research and Sanctuaries Act, their common law nuisance claims and their maritime tort claims. The district court's dismissal of the Refuse Act claim, the Federal Tort Claims Act and the state tort claims act claims, and the constitutional claims will be affirmed. The district court's dismissal of the National Environmental Policy Act claim will be vacated and that claim remanded for consideration of the record developed on remand. The case will be remanded to the district court for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Judgment of the Court of Appeals

(Filed—February 5, 1980)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1360

NATIONAL SEA CLAMMERS ASSOCIATION and GOSTA LOVGREN,

Appellants,

v.

CITY OF NEW YORK, HONORABLE ABRAHAM BEAME, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RUSSELL E. TRAIN, individually and as ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES ARMY CORPS OF ENGINEERS, MARTIN R. HOFFMANN, individually and as SECRETARY OF THE UNITED STATES DEPARTMENT OF THE ARMY, NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION, OGDEN R. REID, individually and as COMMISSIONER OF THE NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION, NEW JERSEY DEPARTMENT OF

ENVIRONMENTAL PROTECTION, DAVID J. BARDIN, individually and as COMMISSIONER OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, BERGEN COUNTY SEWER AUTHORITY, THE JOINT MEETING OF ESSEX AND UNION COUNTIES, PASSAIC VALLEY SEWERAGE COMMISSIONERS, MIDDLESEX COUNTY SEWERAGE AUTHORITY, THE LINDEN ROSELLE SEWERAGE AUTHORITY, MIDDLETOWN SEWERAGE AUTHORITY, WEST LONG BEACH SEWER DISTRICT, COUNTY OF WESTCHESTER, DEPT. OF ENVIRONMENTAL FAC., CITY OF LONG BEACH AND CITY OF GLEN COVE.

(D.C. Civil No. 77-0126)

On Appeal from the United States District Court for the District of New Jersey

Present: Gibbons and Higginbotham, *Circuit Judges* and Weiner, *District Judge**

Judgment

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on October 16, 1979.

On consideration whereof, it is now here ordered and

* Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

adjudged by this Court that the judgment of the said District Court filed January 9, 1979, be, and the same is hereby affirmed as to that portion of the said judgment dismissing the Refuse Act claim, the Federal Tort claims Act and state tort claims act claims, and the constitutional claims; that part of the judgment dismissing the complaint is reversed to the extent that it dismissed plaintiffs' claims under the Federal Water Pollution Control Act, the Marine Protection, Research and Sanctuaries Act, their common law nuisance claims and their maritime tort claims; that portion of the judgment dismissing the National Environmental Policy Act claim is vacated and that claim is remanded for consideration of the record developed on remand. It is further ordered that the cause is hereby remanded to the district court for further proceedings, consistent with the opinion of this Court.

ATTEST:

THOMAS F. QUINN
Clerk

February 5, 1980

Certified as a true copy and issued in lieu
of a formal mandate on March 21, 1980.

Test: M. (Illegible)
Chief Deputy Clerk,
United States Court of Appeals
for the Third Circuit

Opinion of the District Court

(Filed—August 14, 1978)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

CIVIL ACTION No. 77-126

NATIONAL SEA CLAMMERS ASSOCIATION, etc., *et al.*,

Plaintiffs,

v.

CITY OF NEW YORK, etc., *et al.*,

Defendants.

MEANOR, District Judge.

This matter comes before the court on motions by 14 defendants to dismiss the complaint for lack of jurisdiction and/or failure to state a claim upon which relief may be granted. Because the parties rely on material outside the pleadings, these motions will be treated as ones for summary judgment.

Plaintiffs are the National Sea Clammers Association (NSCA), an incorporated association with its principal place of business in Absecon, New Jersey, and Gosta Lovgren, a member of NSCA and a New Jersey resident. They have brought this class action on behalf of those who

harvest the waters and sea beds of the Atlantic Ocean for a living against 16 governmental agency and individual defendants. Said defendants are municipal, county or federal governmental bodies, and employees thereof, charged with responsibility for sewage disposal and dredging operations on or about the New York-New Jersey seacoast. They may be classified as New York, New Jersey or federal. The New York defendants are: City of New York; Abraham Beame, Mayor of the City of New York;[1] West Long Branch Sewer District;[2] County of Westchester;[3] City of Long Beach and City of Glen Cove. The New Jersey defendants are: Bergen County Sewer Authority; The Joint Meeting of Essex and Union Counties; Passaic Valley Sewerage Commissioners; Middlesex County Sewerage Authority; Linden-Roselle Sewerage Authority; and Middletown Sewerage Authority. The federal defendants are the United States Environmental Protection Agency (USEPA); Russell E. Train, individually and as Administrator of USEPA: the United States Army Corps of Engineers (USACE); and Martin R. Hoffman, individually and as Secretary of the United States Department of the Army.

Plaintiffs allege that the defendants, by commission or omission, have caused or permitted the pollution of the

---

[1] Since the filing of this complaint, Edward Koch has replaced Mr. Beame as Mayor of New York City.

[2] The West Long Beach Sewer District has never been served with summons and complaint in this action.

[3] The County of Westchester was apparently served with summons and complaint on January 26, 1977, but it has yet to file an answer.

Atlantic Ocean by sewage and other wastes and debris, which pollution has directly or indirectly resulted in damage to the marine environment and destruction of ocean life and the clamming industry. The only damage precisely described in terms of location and date is the allegation that defendants' polluting activities resulted in a massive growth of algae covering the Atlantic Ocean from a few to 20 miles offshore over an area from southwest Long Island, New York to due east of Cape May, New Jersey. This algal bloom is alleged to have occurred in the summer of 1976.

Plaintiffs predicate their 11 count complaint[4] on a myriad of federal and state grounds: The Federal Water Pollution Control Act Amendments of 1972 (FWPCAA), 33 U.S.C. § 1251 *et seq.* (Supp. 1977); The Marine Protection, Research, and Sanctuaries Act of 1972 (Ocean Dumping Act or MPRSA), 33 U.S.C. § 1401 *et seq.* (Supp. 1977); The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.* (1977); Section 13 of the Rivers and Harbors Act of 1899 (Refuse Act), 33 U.S.C. § 407 (1970); article VI, clause 2 of the Constitution of the United States and the fifth, ninth and fourteenth amendments; the Civil Rights Act, 42 U.S.C. § 1983 (1974); the Extension of Admiralty and Maritime Juris-

---

[4] As originally filed, the complaint contained 13 counts against 20 defendants. On April 26, 1977, the complaint was dismissed as to four New York and New Jersey state defendants: The New York Department of Environmental Conservation (NYDEC); Ogden R. Reid, individually and as Commissioner of NYDEC; the New Jersey Department of Environmental Protection (NJ DEP); and David J. Bardin, individually and as Commissioner of NJDEP. At that time, counts V and VI, which pertain only to the dismissed defendants, were dismissed.

dictional Act, 46 U.S.C. § 740 (1975); the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1976) and 28 U.S.C. § 2671 *et seq.* (1965); The Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* (1977); federal common law nuisance; New York Environmental Conservation Law, N.Y.Environ.Conserv. § 1-0101 *et seq.* (McKinney 1973); New Jersey Conservation and Development Law, N.J.S.A. 13:10-1 *et seq.* (1968); and state common law trespass and nuisance. Plaintiff allege jurisdiction under 28 U.S.C. §§ 1331 (1966), 1333 (1966); 1343 (1976); 1346 (b) (1976), 1337 (1976) and 1361 (1976).[5] Plainitffs seek $250 million in compensatory damages, $250 million in punitive damages, fines, an injunction and other relief.

The instant action was filed on January 14, 1977. With the exception of the federal defendants and West Long Beach Sewer District, service was effected on the defendants between January 25, 1977 and February 1, 1977. While the summons and complaint were served on USACE, Hoffman, USEPA and Train on January 27, 1977, service against the four federal defendants was not perfected pursuant to F.R.Civ.P. 4(d)(4) (Supp. 1977) until December 2, 1977 with the service of the Attorney General of the United States and the U.S. Attorney for the District

---

[5] Plaintiffs have also attempted to predicate jurisdiction on two clearly inappropriate bases, to wit, 28 U.S.C. § 1332 (diversity) and the APA, 5 U.S.C. § 701 *et seq.* Because plaintiffs and several defendants are residents of New Jersey, plaintiffs have failed to show the complete diversity required for jurisdiction under 28 U.S.C. § 1332. *Strawbridge* v. *Curtis*, 7 U.S. (3 Cranch) 267 (1806); *Quaker State Dyeing & Finishing Co.* v. *Cally*, 528 F.2d 470, 473 (3d Cir. 1975). The APA does not provide an independent jurisdictional base for a suit challenging governmental action. *Califano* v. *Sanders*, 430 U.S. 99 (1977).

of New Jersey. West Long Beach Sewer District was never served. A number of the defendants have filed crossclaims against the other defendants alleging that the crossclaimants have complied with applicable federal and state permits and, therefore, any liability on their part is attributable to the conduct of others.

Some of the defendants received, in addition to the complaint, special notice of plaintiffs' claims. Said notice was in the form of a letter[6] from Edward German, on

---

[6] The letter was essentially a form letter with appropriate modifications for each addressee. The following is the text of the letter sent to the City of New York:

> PLEASE TAKE NOTICE, that I, Edward C. German, on behalf of the National Sea Clammers' Association and the class of claimants representing clamdiggers, lobstermen, and fishermen, hereby claim damages in excess of the sum of $250 million, against the City of New York, for injuries and damages to, and the destruction of the property specified in the statement below, and unless such claim is adjusted and paid within the time specified by law, I shall commence an action against said City of New York, to enjoin the complained of conduct, to require the City to take corrective action and to recover damages in excess of $250 million and please take further notice
>
> THAT said property has been damaged day by day since approximately on or before September of 1976 in the Atlantic Ocean in an area ranging from approximately the southwest portion of Long Island, New York, to a point approximately due east of Cape May, New Jersey, and extending from a few miles off shore to more than twenty (20) miles out to sea and further
>
> THAT said damage has been inflicted upon claimants' clam beds, lobster beds, and fishing grounds when such clam beds,

(Footnote continued on following page)

behalf of NSCA, claiming damages caused by pollution to marine environment and life of the Atlantic in an amount "in excess of 250 million dollars." The letter stated further that the property damaged, the value thereof and the cost of repair "cannot be specifically itemized and estimated at this time." This letter was served on the City of New York on November 29, 1976, on Train, Hoffman and USACE on January 3, 1977, and on the cities of Glen Cove and Long Beach on March 25, 1977. The record contains conflicting sworn statements as to whether plaintiffs served the Middlesex County Sewerage Authority with letter notice. Plaintiffs claim to have made service on March 25, 1977, but Middlesex denies receipt.

In addition, on or about March 22, 1977 USEPA was served with a formal claim filed pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* The amount of the claim was stated to be "in excess of $250,000,000."

The rest of the defendants received no notice of the plaintiffs' claims other than the complaint itself.

With the exception of West Long Beach Sewer District and the County of Westchester, all the defendants

---

(Footnote continued from preceding page)

lobster beds, and fishing grounds were destroyed by and through the sewage systems owned, operated, and controlled by the City of New York, by which sludge and sewage effluent was dumped directly by ship into the ocean and by which sewage effluent was carried into the ocean by outfall pipes maintained by the City of New York and further

THAT a statement in detail of the property damaged and/or destroyed and the value thereof, as well as the specific cost of repair to claimants' damage property cannot be specifically itemized and estimated at this time.

have joined in the instant motions for summary judgment on the complaint. Because of the number and variety of the movants and the number of issues raised, I shall consider the contentions of the parties essentially on a count-by-count basis.

Discussion

I

Count I charges that the New York and New Jersey defendants have released sewage effluent and dumped dredgings and toxic materials into the Atlantic with the approval and direction of the federal defendants. These polluting activities are claimed to have fed an algal bloom in the Atlantic during the summer of 1976, destroyed marine life, caused the collapse of the fishing industry and created noxious sights and smells. The creation of this harm and nuisance is specifically alleged to raise a federal question. Thus, Count I sounds in federal common law nuisance.

The defendants assert that private parties, such as the plaintiffs, have no standing to raise a claim in federal common law nuisance. The authorities support defendants' position. In *Illinois* v. *Milwaukee*, 406 U.S. 91 (1972), the Supreme Court held that the states could sue on a theory of federal common law nuisance to abate the pollution of interstate waters. The Court cited *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907), which spoke of the necessity of allowing to states an avenue for judicial resolution of interstate disputes because when the states joined the Union, they gave up their right to forcibly abate nuisances created in other states. *Illinois* v.

Milwaukee, supra, at 104. The opinion quoted further language from the same case to the effect that the Court found it reasonable to enforce a sovereign's demand to be protected from pollution from an extra-state source, notwithstanding the Court's hesitancy to hear a suit between private parties predicated on a federal common law theory. *Id.* at 104-05. Lower courts have refused to extend a right of action in federal nuisance to private parties. *Parsell* v. *Shell Oil Co.,* 421 F.Supp. 1275 (D. Conn. 1976); *Committee for the Consideration of the Jones Falls Sewerage System* v. *Train,* 375 F.Supp. 1148 (D. Md. 1974), *aff'd on different but not inconsistent grounds,* 539 F.2d 1006 (4th Cir. 1976). Plaintiffs have cited no cases to the contrary. It appears that plaintiffs have no standing to raise their federal common law nuisance claim, and Count I must be dismissed.

II

Count II charges the New York and New Jersey defendants and USACE with dumping into the Atlantic and the Hudson River refuse other than that flowing from the streets and sewers in a liquid state in violation of section 13 of the Rivers and Harbors Act of 1899 (Refuse Act), 33 U.S.C. § 407. The defendants take the position that there is no private action under the Refuse Act. Plaintiffs argue that the purpose of the Refuse Act would be advanced by a "private attorney general" action and that such actions have been permitted at least against federal defendants.

The enforcement of the Refuse Act is specifically delegated to the United States, 33 U.S.C. § 413, and it has generally been held that there is no implied private right

of action thereunder. *See, e.g., Connecticut Action Now, Inc.* v. *Roberts Plating Co.*, 457 F.2d 81 (2d Cir. 1972); *Loveladies Property Owners Association* v. *Raab* (*Loveladies*), 430 F.Supp. 276, 281 (D.N.J. 1975), *aff'd mem.*, 547 F.2d 1162 (3d Cir. 1976); *Township of Long Beach* v. *City of New York* (*Township of Long Beach*), 445 F.Supp. 1203, 1211 & cases cited therein (D.N.J. 1978). However, some courts have found a private right of action under the Refuse Act against federal defendants, *Natural Resources Defense Council* v. *Grant*, 355 F.Supp. 280 (E.D. N.C. 1973); *People of State of Illinois ex rel. Scott* v. *Hoffman*, 425 F.Supp. 71 (S.D. Ill. 1977), on the theory that where the violator is federal, the U.S. Attorney is in no position to enforce the act because he is also charged with the responsibility of defending the violator. *Natural Resources Defense Council* v. *Grant, supra*, at 290.

The rule in this circuit appears to be that there is no private right of action under the Refuse Act regardless of the identity of the defendant. I deduce this from the fact that in *Loveladies, supra*, the Third Circuit affirmed the dismissal of a private cause of action under the act brought against federal and other defendants. *Accord, Township of Long Beach, supra*, at 1212; *Bass Angler Sportsman Society* v. *United States Steel Corp.*, 324 F. Supp. 412, 416 (D. Ala.), *aff'd per curiam sub nom., Bass Anglers Sportsman Society* v. *Koppers Co.*, 447 F.2d 1304 (5th Cir. 1971). *Cf., Red Star Towing and Transportation Co.* v. *Department of Transportation of State of New Jersey*, 423 F.2d 104, 106 (3d Cir. 1970). Thus, plaintiffs' claims in Count II must fall.

III

In Counts III, IV, VIII and IX, the various defendants are charged with violations of FWPCAA and/or MPRSA. Count III alleges that the federal defendants have violated MPRSA. Count IV charges USEPA and Train with violations of FWPCAA. Count VIII alleges that the New York and New Jersey defendants have violated FWPCAA, MPRSA, New York Environmental Conservation Law, New Jersey Conservation and Development Law and permits issued by USEPA, USACE or NYDEC. Count IX charges the federal defendants with negligently carrying out their discretionary functions under FWPCAA, MPRSA and NEPA and further alleges that USACE conducted its dredging activities negligently.

Private actions to enforce FWPCAA and MPRSA are authorized by citizens' suit provisions in each act, 33 U.S.C. §1365(a), (b) and (c) [7] and 33 U.S.C. § 1415(g)[8] respec-

---

[7] 33 U.S.C. § 1365 provides:

> (a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

(Footnote continued on following page)

(Footnote continued from preceding page)

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) No action may be commenced—

(1) under subsection (a) (1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a) (2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) (1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(Footnote continued on following page)

(Footnote continued from preceding page)

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

* * *

[8] 33 U.S.C. § 1415(g) provides:

(g)(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any prohibition, criterion, or permit established or issued by or under this subchapter. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such prohibition, limitation, criterion, or permit, as the case may be.

(2) No action may be commenced—

(A) prior to sixty days after notice of the violation has been given to the Administrator or to the Secretary, and to any alleged violator of the prohibition, limitation, criterion, or permit; or

(B) if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States to require compliance with the prohibition, limitation, criterion, or permit; or

(C) if the Administrator has commenced action to impose a penalty pursuant to subsection (a) of this section, or if the Administrator, or the Secretary, has initiated permit revocation or suspension proceedings under subsection (f) of this section; or

(D) if the United States has commenced and is diligently prosecuting a criminal action in a court

tively. The two citizens' suit provisions are substantially the same. Each contains a notice clause providing that no actions may be commenced under the citizens' suit provision except upon giving notice to the alleged violator of the act in compliance with the terms of the act and regulations thereunder.

All the defendants argue that plaintiffs have failed to give the requisite notice that therefore this court has no jurisdiction over plaintiffs' WFPCAA and MPRSA claims. Plaintiffs retort that service of the complaint constitutes substantial compliance with the notice provision. Further, they argue that the court has alternative jurisdiction over these citizens' claims under 28 U.S.C. § 1331, and that in a § 1331 citizens' suit the notice provisions of 33 U.S.C. §§ 1365 and 1415 do not apply. Because the questions of the sufficiency of notice and the availability of alternative jurisdiction without the requirement of notice are threshold issues common to Counts III, IV, VIII and IX, I shall treat those counts together. I shall first consider the FWPCAA claims, then the MPRSA claims, and finally any remaining issues in each of the four counts.

Under FWPCAA, citizens' actions may be brought against anyone who fails to comply with an effluent standard, limitation or order issued under the act, 33 U.S.C. § 1365(a)(1), or against the USEPA Administrator for failure to perform a non-discretionary duty mandated by the act, 33 U.S.C. § 1365(a)(2). No citizens' action may be commenced without prior notice to the alleged act violator in accordance with USEPA regulations, and, except in circumstances not here relevant, notice must be given at least 60 days before the commencement of the action. 33 U.S.C. § 1365(b). Notice to the alleged violator in a § 1365(a)(1) suit must specify the standard, limitation or

order allegedly violated. 40 C.F.R. § 135.3 (1977). Notice to the USEPA Administrator in a § 1365(a)(2) suit must specify the statutory provision claimed to have been transgressed. *Id.* Plaintiffs have failed to give notice to any defendant which satisfies FWPCAA requirements. To the extent notice was given at all, it was untimely and failed to specify any standard, limitation, order or statuory section purportedly violated. Since strict compliance with the notice provisions of 33 U.S.C. § 1365 is required, *Loveladies, supra,* this court does not have jurisdiction of any FWPCAA claims under 33 U.S.C. § 1365.

Plaintiffs take the position that 28 U.S.C. § 1331 provides an alternative basis for jurisdiction. They base their argument on the savings clause of FWPCAA, 33 U.S.C. § 1365(e), which provides:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

They urge that the only interpretation of FWPCAA which gives proper effect to the savings clause is on that finds an implied right of action for private parties to enforce FWPCAA unfettered by the notice requirements of § 1365 (b) which right may be exercised by grounding jurisdiction on the "arising under" jurisdictional statute.

There is a split among the circuits on the issue whether the virtually identical citizens' suit provisions of FWP CAA, MPRSA and the Clean Air Act, as amended, 42 U.S.C. § 1857 *et seq.* (1969), 42 U.S.C. § 1857h-2 (Supp. 1977), are the exclusive jurisdictional base for private

actions to enforce said environmental legislation. The D.C. and Second Circuits have held that the FWPCAA provision is not exclusive, and jurisdiction may be predicated alternatively on 28 U.S.C. § 1331 without compliance with the citizens' suit notice requirement. *Natural Resources Defense Council, Inc.* v. *Train (NRDC* v. *Train),* 510 F.2d 692 (D.C. Cir. 1974), *as modified,* (D.C. Cir. 1975); *Natural Resources Defense Council, Inc.* v. *Callaway,* 524 F.2d 79 (2d Cir. 1975). The Seventh Circuit has held squarely to the contrary with regard to the citizens' suit provisions of the Clean Air Act. *Ctiy of Highland Park* v. *Train, (Highland Park),* 519 F.2d 681 (7th Cir. 1975). Another court in this district has followed the lead of the D.C. and Second Circuits on this issue in a FWP CAA and MPRSA context. *Township of Long Beach, supra* (Fisher, J.).

In *Highland Park, supra,* Judge Tone, writing for the court, noted that

> [t]he legislative history of section 304 [42 U.S.C. § 1857h-2 (citizens' suit provision)] shows Congress's determination that citizen participation in the enforcement of standards and regulations under the Clean Air Act of 1970 be established. It also shows, however, that Congress intended to provide for citizens' suits in a manner that would be least likely to clog already burdened Federal Courts and most likely to trigger governmental action which would alleviate any need to for judicial relief. It was in response to these concerns that the statutory notice provisions were included in section 304. Congress's intention would be frustrated if the statutory mandate of section 304(b) were ignored.

Id. at 690-91. Later, in discussing *NRDC* v. *Train, supra,* which is cited without analysis as persuasively precedent in *Natural Resources Defense Council* v. *Callaway, supra,* Judge Tone indicated

> [i]n [*NRDC* v. *Train*], 510 F.2d 692, 698-703 (D.C. Cir. 1975), the majority held that under the Federal Water Pollution Control Act, the pertinent provisions of which are substantially the same as those of the Clean Air Act, judicial review could be obtained . . . under 28 U.S.C. § 1331 . . ., and refers to the Clean Air Act and its legislative history as a basis for its holding. The majority's opinion . . . bases its holding on the saving provision of the Federal Water Pollution Control Act, 33 U.S.C. § 1365(e), which is substantially the same as the saving provision in section 304 of the Clean Air Amendments of 1970, 42 U.S.C. § 1857h-2(e), and the statments in the legislative history that other remedies were not impaired by the act. The opinion does not give any reasons for the court's . . . holding that jurisdiction was . . . conferred by 28 U.S.C. § 1331. Judge Robb's dissent argues that the 60-day notice requirement should control.

Id. at 693. The Seventh Circuit ultimately concluded that

> [t]he saving provision, expressing the general intention of Congress not to disturb existing rights to seek relief, does not have the affirmative effect of removing conditions which existing law imposes upon the exercise of those rights.

Id. at 693.

I concur in the Seventh Circuit's analysis of the citizen suit provision. While the saving clause of FWPCAA, 33

U.S.C. § 1465(e), may indeed make § 1331 available to an alternative basis for jurisdiction, it does not, in addition, provide a basis to imply a citizens' right of action under FWPCAA on terms and conditions different from those specifically delineated by Congress. The manifest purpose of the savings clause seems to be the preservation of existing rights, not the creation of new ones. Thus, satisfaction of the notice requirements is an unavoidable prerequisite to a citizens' suit. Since plaintiffs have failed to give the notice required by FWPCAA and the regulations thereunder, their FWPCAA claims must fail.

Because the MPRSA citizens' suit provisions, including the notice requirements, are identical to those of FWP CAA in all relevant respects, I have no jurisdiction over plaintiffs' MPRSA claims for the aforementioned reasons. Thus, Counts III and IV must be dismissed in their entirety, and Counts VIII and IX are dismissed insofar as they allege FWPCAA and MPRSA claims.

The claims remaining in Count VIII allege that the New York and New Jersey defendants have violated New York Environmental Conservation Law, permits issued by NYDEC and New Jersey Conservation and Development Law. These are state law claims which will be discussed in XI, *infra.*

Left in Count IX are claims that the federal defendants negligently conducted their discretionary functions under NEPA and that USACE conducted its dredging activities negligently. Violations of NEPA may be reviewed by the courts pursuant to the APA, except insofar as the APA exempts certain functions from review. *See Environmental Defense Fund* v. *Corps of Engineers, U.S. Army,* 470 F.2d 289, 298-300 (8th Cir. 1972). However,

discretionary functions are reviewable under the APA, 5 U.S.C. § 706, only where the agency or officer exceeds the limits of discretion established by Congress. *SEC* v. *Republic National Life Insurance Co.*, 383 F.Supp. 436, 438 (S.D.N.Y. 1974); *International Waste Controls, Inc.* v. *SEC*, 362 F.Supp. 117 (S.D.N.Y. 1973), *aff'd per curiam*, 485 F.2d 1238 (2d Cir. 1973). Since no such excess has been alleged, I have no jurisdiction over this NEPA claim. As to the claim of negligent dredging, this claim sounds in tort, and for reasons more fully set forth in IX, *infra*, plaintiffs are precluded by the Federal Tort Claims Act from suing USACE with regard to the conduct alleged in the complaint. Thus, Count IX must be dismissed.

IV

In Count VII, plaintiffs allege that USEPA and Train have violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, in that

> [d]espite the continued and increasing discharge of pollutants into the Hudson River, New York Harbor and Atlantic Ocean, defendants have failed to develop, plan, and coordinate federal functions, programs, and resources to the end that the marine environment of the Atlantic Ocean might exist without degradation, and that those who use the marine environment might do so without risk to health or safety or other undesirable and unintended consequences.

Complaint ¶ 71.

The defendants correctly argue that USEPA and its Administrator are specifically exempted by FWPCAA

from NEPA requirements, except as regards (1) grants for construction of treatment works and (2) the issuance of new source permits. 33 U.S.C. § 1371(c). Plaintiffs have offered no rebuttal on this point. Since neither of the non-exempt functions are alleged in Count VII, this count fails to state a claim upon which relief may be granted.

V

Count X charges that all the defendants, by action or inaction, have caused "unreasonable degradation of the marine environment" in which there is a public right protected by the fifth, ninth and fourteenth amendments.

The defendants argue that these allegations fail to state a claim because there is no constitutionally protected right to a clean, unpolluted environment. Plaintiffs cite no cases in support of their position that such right exists. Indeed, the courts have consistently held to the contrary. *Ely* v. *Velde,* 451 F.2d 1130, 1139 (4th Cir. 1971); *Township of Long Beach, supra,* at 1212 & cases cited therein. Consequently, Count X must be dismissed.

VI

Count XI alleges that the New York and New Jersey defendants and USACE, by their polluting conduct, have taken and destroyed property held in trust for the public benefit in violation of the prohibition of the fifth amendment of the Constitution of the United States against the taking of private property for public use without just compensation. The defendants argue that plaintiffs have no property right in coastal waters and marine life. Plaintiffs take no position on this point.

It is settled law that the states have title to the coastal waters and marine life within their boundaries, including the seabeds and beds of all tidal waters, within three miles of the coast, while title to the waters beyond three miles from the coast is in the United States. *McCready* v. *Virginia,* 94 U.S. 391 (1876); *U.S.* v. *Florida,* 425 U.S. 791 (1976); Submerged Lands Act of 1953, 43 U.S.C. § 1301 *et seq.* (1964), 43 U.S.C. §§ 1311(a) and 1332. Individual citizens have no property interest in the sea waters, sea beds or marine life. *Burgess* v. *M/ Tamano,* 370 F.Supp. 247, 249 (S.D. Me. 1973). Thus, plaintiffs have no interest protected from condemnation without compensation by the fifth amendment, and Count XI must be dismissed.

VII

Plaintiffs' complaint lists 42 U.S.C. § 1983 as one of the statutes upon which this action is grounded. No specific allegations of facts supporting a § 1983 claim have been made, however. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Since § 1983 requires state action, any claim under that provision against the federal defendants must be dis-

missed. As to the New York and New Jersey defendants, plaintiffs have failed to plead any right protected by the Constitution[9] at stake in this action. *See* V, VI, *supra.* Nor have plaintiffs alleged any statutory right, privilege or immunity deprived by state action. The various environmental statutes at issue here do not create rights to a clean environment. To the extent they vest private parties with any special interests, they create rights of action to enforce certain statutory provisions. The plaintiffs have not alleged that the state defendants have interfered with the exercise of such rights or action. Thus, any § 1983 claim of the plaintiffs must fall.

VIII

Plaintiffs have pleaded the Extension of Admiralty and Maritime Jurisdiction Act, 42 U.S.C. § 740, as one of the bases for this action, but again they have failed to make any factual allegations in support of such claim. Section 740 provides in part that

> [t]he admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

---

[9] Plaintiffs have listed the supremacy clause, art. VI, cl. 2, as one of the many legal bases for this action, but have failed to allege how the provision is implicated in the issues presented. In any case, the supremacy clause does not confer on the plaintiffs any independent right relevant to the matters alleged in the complaint.

Hence, only defendants' polluting activities conducted from ships causing damage on land would be actionable under this provision. In addition, the section specifically requires damage "to person or property." Plaintiffs have alleged no personal injury in their complaint. Nor have they cited any authority which suggests that any of the alleged wrongful conduct caused damage on land which is cognizable under 42 U.S.C. § 740 in admiralty. Thus, plaintiffs have failed to state a cause of action under this section.

IX

Plaintiffs have listed admiralty, 28 U.S.C. § 1333(1), as one of the jurisdictional bases for this action. Some courts have indicated that a commercial fisherman's allegation that polluting activities have caused damage to his fishing operation states a claim for tortious interference with a public right, a public nuisance cause of action cognizable as a maritime tort in admiralty. *Potomac River Association, Inc.* v. *Lundeberg Maryland Seamanship School, Inc.* (*Potomac River*), 402 F.Supp. 344, 358 (D. Md. 1975); *Burgess* v. *M/V Tamano* (*M/V Tamano*), *supra,* at 250. In brief, the theory is that while a public nuisance is usually actionable only by the state, a private individual may recover for invasions of the public right if he can show damage of a different kind—not merely of a different degree—from that of the public generally. Commercial fishermen have been held to have such a special interest in the pollution of marine waters. *M/V Tamano, supra,* at 250. Torts are cognizable in admiralty where the activity of the injured party bears a significant relationship to a traditional maritime activity. *Executive Jet Aviation, Inc.* v. *Cleveland,* 409 U.S. 249

(1973); *Union Oil Co.* v. *Oppen,* 501 F.2d 558 (9th Cir. 1974); *Potomac River, supra,* at 358. Since fishing is a traditional maritime activity, tortious damage to fishing by pollution is actionable as a maritime tort. *Potomac River, supra,* at 358. Of course, polluting activities which are in conformity with permits or regulations under pertinent environmental statutes are immunized from tort liability. Id. at 359.

Plaintiffs have not pleaded a claim in this maritime tort, nor have they requested that their complaint be construed to allege such a cause of action. Therefore, I decline to read such a claim into their pleadings. However, even if plaintiffs had raised such a claim, except as to one defendant, their cause of action would have run aground on the shoals of the notice provisions of various tort claims acts.

The federal agency and the state agency defendants are arms of their respective sovereigns, and, hence, are subject to suit in tort only in accordance with the conditions of the waiver of sovereign immunity specified in the tort claims act of each respective sovereign. *See* N.Y. Gen. Mun. Law §§ 50-i, 50-e (McKinney 1977, § 50-i; The New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.* (Supp. to Title 58, 1977), N.J.S.A. 59:1-3; the Federal Tort Claims Act, 28 U.S.C. § 1346(b) and 28 U.S.C. § 2671 *et seq.,* 28 U.S.C. §§ 1346(b) and 2676. The two federal individual defendants and the mayor of the City of New York, to the extent each acted within the scope of his employment, also enjoy the protection of their respective tort claims act. *See* 28 U.S.C. §§ 1346(b) and 2679(a); N.Y. Gen. Mun. Law § 50-i(1) (McKinney). Each of the three tort claims acts requires the submission of notice of plaintiffs' claim as a predicate to suit.

New York requires that notice be given to the defendant within 90 days of the accrual of the cause of action, § 50-e(1)(a), and that thereafter 30 days must elapse before the commencement of suit, § 50-i(1). Here, the alleged damage occurred in the summer of 1976. New York City received notice on November 29, 1976, and the action was filed on January 14, 1977. None of the other New York defendants received notice, if they got it at all, until March 25, 1977. Hence, only New York City received timely notice. Although application may be made to the court for late notice, § 50-e(5), plaintiffs have made no such effort. Further, leave to grant such application is within the discretion of the court, and since plaintiffs have offered no explanation for their tardiness, I would be disinclined to grant plaintiffs' relief. Mayor Beame was not sued in an individual capacity, and no allegations have been made that he exceeded the scope of his authority. Thus, of the New York defendants, only New York City is subject to tort suit.

The New Jersey Tort Claims Act requires a claim to be presented to the defendant entity within 90 days of accrual of the cause of action. N.J.S.A. 59:8-8. Application for late filing may be made only up to one year after the accrual of the claim. N.J.S.A. 59:8-9. Plaintiffs have failed to give notice to any New Jersey defendant, except possibly Middlesex County Sewerage Authority. Assuming plaintiffs served a notice on Middlesex on the date they claim, said notice was not timely. No timely application for late filing was made. Thus, plaintiffs are forever barred from bringing these tort claims against the New Jersey defendants. *See* N.J.S.A. 59:8-8(a); *Pinckney* v. *City of Jersey City,* 140 N.J. Super. 96 (Law Div. 1976).

The Federal Torts Claims Act requires that would-be plaintiffs file an appopriate claim with the defendant agency and then wait for six months before commencing suit. 28 U.S.C. § 2675(a). The claim must state a sum certain, 40 C.F.R. § 10.2(a) (1977), and one which does not is a nullity. *Bialowa* v. *U. S.*, 443 F.2d 1047, 1050 (3d Cir. 1971). Plaintiffs served their letter notice on USACE, Hoffman and Train on January 3, 1977, and a formal tort claim on USEPA on March 22, 1977. Neither form of notice stated a sum certain, and neither was served six months before suit. The fact that service was not effective on the federal defendants until 10 months after the filing of the complaint does not cure plaintiffs' notice defects. *See Gunstream* v. *U.S.*, 307 F.Supp. 366, 369 (C.D. Cal. 1969). Thus, plaintiffs' tort claims are barred by the Federal Tort Claims Act against USEPA, USACE and against the individual federal defendants to the extent they acted within the scope of their employment.

The complaint recites that Hoffman and Train acted outside the scope of their authority.[10] Complaint ¶¶ 55, 59. The virtually identical language of the pertinent paragraphs provides:

> (d) Defendant [referring to all the federal defendants or Train and USEPA] have repeatedly exceeded their authority as expressly provided in [FWPCAA or MPRSA].
>
> (e) In particular, defendants have taken no action, despite enforcement powers, to object to or to

---

[10] Federal officials do not have absolute immunity for conduct which is in excess of statutory authority or in violation of the Constitution. *Butz* v. *Economou*, —— U.S. ——, 46 U.S.L.W. 4952 (June 29, 1978).

set aside the granting of and approval of permits issued to conduct ocean dumping operations as described in Count I above.

Enforcement of FWPCAA and MPRSA turns on a host of discretionary functions. Since the pleading fails to state that Hoffman and Train exceeded the scope of their statutory discretionary powers, I construe paragraphs 55 and 59 to allege only abuse of discretion on the part of the individual defendants. Thus, the complaint does not present a claim that they acted beyond the scope of their employment, and they are protected by the Federal Tort Claims Act.

X

Plaintiffs' final federal claim is one in mandamus, 28 U.S.C. §1361. Mandamus is an extraordinary remedy, available only where governmental officials have clearly failed to perform non-discretionary duties. *Loveladies, supra,* at 282; *Carter* v. *Seamans,* 411 F.2d 767, 773 (5th Cir. 1969), *cert. denied,* 397 U.S. 941 (1969). Mandamus is not available where an adequate alternative remedy exists. *Ex Parte Republic of Peru,* 318 U.S. 578, 584 (1943); *Richardson* v. *U.S.,* 465 F.2d 844, 849 (3d Cir. 1972), *rev'd on other grounds,* 418 U.S. 166 (1974). Plaintiffs have alleged that the various defendants have failed to comply with non-discretionary duties under various federal and state environmental statutes and permits issued thereunder. As to any pertinent FWPCAA and MPRSA violations, the citizens' suit provisions of those acts provide a means to compel performance of non-discretionary duties. Plaintiffs have failed to show that the citizens' suit notice provisions render those remedies inadequate. Failure to per-

form non-discretionary NEPA duties not exempted from liability by other statutes may be reviewed pursuant to the APA, 5 U.S.C. § 701 *et seq.* Section 13 of the Refuse Act, 33 U.S.C. § 407, is a criminal provision which imposes only a discretionary duty of enforcement on the U.S. Department of Justice. *See* 33 U.S.C. § 413. None of the other statutes pleaded appear to create any duties obligatory to any of the defendants herein. Therefore, plaintiffs have failed to state a valid claim in mandamus.

XI

The remaining counts are pendant state law claims. Count XII charges all the defendants with creating a nuisance. Count XIII charges the New York and New Jersey defendants and USACE with trespass and damage to property held in public trust. Since plaintiffs' federal claims have all been dismissed, there is no basis for pendant jurisdiction, *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 726 (1966), and these remaining counts must fall. To the extent that Count VIII raises pendant claims for violation of the New York Environmental Conservation Law, the New Jersey Conservation and Development Law and permits issued thereunder, these claims must also be dismissed. Since the disposition on the motions for summary judgment has mooted the crossclaims for indemnity, such crossclaims are dismissed as well.

It should be noted, however, that because plaintiffs have no ownership interest in the marine environment and ocean life, they have no standing to sue in ordinary nuisance, trespass or for damage to property held in public trust. They could, however, raise a claim sounding in tortious interference with a public right. *See* IX, *supra.*

In addition, because plaintiffs failed to comply with the notice provisions of the various tort claims acts, they are precluded from suing in tort against any of the defendants except New York City. *See* IX, *supra.*

The movants will prepare individuals orders[11] in conformity with this decision, and submit them, with consent as to form, within 15 days of the date of this opinion.

Dated: August 14, 1978.

---

[11] Since the claims against West Long Beach Sewer District and the County of Westchester are no different from those against the other New York defendants who received no special notice of plaintiffs' action, said claims are not viable for the reasons set forth in this opinion. Counsel for Glen Cove will kindly prepare an order dismissing the action as to these two defendants.

Order of the District Court

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

CIVIL ACTION No. 77-126

NATIONAL SEA CLAMMERS ASSOCIATION, etc., et al,

Plaintiffs,

v.

CITY OF NEW YORK, etc., et al,

Defendants.

For the reasons set forth in the opinion of the court dated August 14, 1978,

IT IS on this 9th day of January 1979 ORDERED as follows:

1. Count I of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice and with costs;

2. Count II of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice and with costs.

3. Count III of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice and with costs.

4. Count IV of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice and with costs.

5. Count VII of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice and with costs.

6. Count VIII of the complaint herein is dismissed in its entirety as to all defendants named therein with costs and with prejudice as to all claims asserted therein that arise under federal law, but without prejudice as to all claims therein that arise under the law of any state.

7. Count IX of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice and with costs.

8. Count X of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice and with costs.

9. Count XI of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice and with costs.

10. Count XII of the complaint herein is dismissed without prejudice but with costs.

11. Count XIII of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice, except as to defendant New York City the dismissal is without prejudice, but with costs as to all defendants.

12. All crossclaims are hereby dismissed as moot, but without costs.

H. CURTIS MEANOR
U.S.D.J.

Constitutional Provision and Statutes Involved

Eleventh Amendment to Constitution of the United States

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

28 U.S.C. §1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *

28 U.S.C. §1291

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. §1331

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or

value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision thereof is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any set off or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U.S.C. §1333

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

33 U.S.C. §407

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing there-

from in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided,* That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further,* That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

33 U.S.C. §1251

(a) The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.

(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the

permit programs under section 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

* * *

(g) * * * Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

Constitutional Provision and Statutes Involved

33 U.S.C. §1311

(a) Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) In order to carry out the objective of this chapter there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to

any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant ot section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compiance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

(B) not later than July 1, 1938, compliance by all pubicly owned treatemtn works with the requirements set forth in section 1281(g)(2) of this title;

(C) not later than July 1, 1984, with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transpotation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph not later than three years after the date such limitations are established;

(E) not later than July 1, 1984, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall require application of the best conventional pollutant control technology as determined in accordane with regulations issued by the Adminitrator pursuant to section 1314 (b)(4) of this title; and

(F) for all polutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph not later than 3 years after the date such limitations

are established, or not later than July 1, 1984, whichever is later, but in no case later than July 1, 1987.

(c) The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

(d) Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

(e) Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

* * *

(h) The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant in an existing discharge from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that—

(1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 1314(a)(6) of this title;

(2) such modified requirements will not interfere with the attainment or maintenance of that water quality which assures protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife, and allows recreational activities, in and on the water;

(3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable;

(4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;

(6) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(7) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(8) any funds available to the owner of such treatment works under subchapter II of this chap-

ter will be used to achieve the degree of effluent reduction required by section 1281(b) and (g)(2)(A) of this title or to carry out the requirements of this subsection.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the continguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 1251(a)(2) of this title.

* * *

(k) In the case of any facility subject to a permit under section 1342 of this title which proposes to comply with the requirements of subsection (b)(2)(A) of this section by replacing existing production capacity with an innovative production process which will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to such facility and moves toward the national goal of eliminating the discharge of all pollutants, or with the installation of an innovative control technique that has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation and moves toward the national goal of eliminating the discharge of all pollutants, or by achieving the required reduction with an innovative system that has the potential for significantly lower costs than the sys-

tems which have been determined by the Administrator to be economically achievable, the Administrator (or the State with an approved program under section 1342 of this title, in consultation with the Administrator) may establish a date for compliance under subsection (b)(2)(A) of this section no later than July 1, 1987, if it is also determined that such innovative system has the potential for industrywide application.

(*l*) The Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 1317(a)(1) of this title.

33 U.S.C. §1316

* * *

(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedures required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulga-

tion. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality environmental impact and energy requirements.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

(3) The provision of this section shall apply to any new source owned or operated by the United States.

(c) Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in such State. If the Administrator finds that the procedure and the law of any State require the application and enforcement of standards of performance to at least the same extent as required by this section, such State is authorized to apply and enforce such standards of performance (except with respect to new sources owned or operated by the United States).

(d) Notwithstanding any other provision of this chapter, any point source the construction of which is commenced after October 18, 1972, and which is so constructed as to meet all applicable standards of performance shall not be subject to any more stringent standard of performance during a ten-year period beginning on the date of completion of such construction or during the period

of depreciation or amortization of such facility for the purposes of section 167 or 169 (or both) of Title 26, whichever period ends first.

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source in violation of any standard of performance applicable to such source.

33 U.S.C. §1317

* * *

(2) Each toxic pollutant listed in accordance with paragraph (1) of this subsection shall be subject to effluent limitations resulting from the application of the best available technology economically achievable for the applicable category or class of point sources established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title. The Administrator, in his discretion, may publish in the Federal Register a proposed effluent standard (which may include a prohibition) establishing requirements for a toxic pollutant which, if an effluent limitation is applicable to a class or category of point sources, shall be applicable to such category or class only if such standard imposes more stringent requirements. Such published effluent standard (or prohibition) shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms, and the extent to which effective control is being or may be achieved under other regulatory authority. The Administrator shall allow a period

of not less than sixty days following publication of any such proposed effluent standard (or prohibition) for written comment by interested persons on such proposed standard. In addition, if within thirty days of publication of any such proposed effluent standard (or prohibition) any interested person so requests, the Administrator shall hold a public hearing in connection therewith. Such a public hearing shall provide an opportunity for oral and written presentations, such cross-examination as the Administrator determines is appropriate on disputed issues of material fact, and the transcription of a verbatim record which shall be available to the public. After consideration of such comments and any information and material presented at any public hearing held on such proposed standard or prohibition, the Administrator shall promulgate such standard (or prohibition) with such modification as the Administrator finds are justified. Such promulgation by the Administrator shall be made within two hundred and seventy days after publication of proposed standard (or prohibition). Such standard (or prohibition) shall be final except that if, on judicial review, such standard was not based on substantial evidence, the Administrator shall promulgate a revised standard. Effluent limitations shall be established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title for every toxic pollutant referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives as soon as practicable after December 27, 1977, but no later than July 1, 1980. Such effluent limitations or effluent standards (or prohibitions) shall be established for every toxic pollutant listed under paragraph (1) of this subsection as soon as practicable after it is so listed.

(3) Each such effluent standard (or prohibition) shall be reviewed and, if appropriate, revised at least every three years.

(4) Any effluent standard promulgated under this section shall be at that level which the Administrator determines provides an ample margin of safety.

(5) When proposing or promulgating any effluent standard (or prohibition) under this section, the Administrator shall designate the category or categories of sources to which the effluent standard (or prohibition) shall apply. Any disposal of dredged material may be included in such a category of sources after consultation with the Secretary of the Army.

(2) The Administrator shall, from time to time, as control technology, processes, operating methods, or other alternative change, revise such standards following the procedure established by this subsection for promulgation of such standards.

(3) When proposing or promulgating any pretreatment standard under this section, the Administrator shall designate the category or categories of sources to which such standard shall apply.

(4) Nothing in this subsection shall effect any pretreatment requirement established by any State or local law not in conflict with any pretreatment standard established under this subsection.

(c) In order to insure that any source introducing pollutants into a publicly owned treatment works, which source would be a new source subject to section 1316 of

this title if it were to discharge pollutants, will not cause a violation of the effluent limitations established for any such treatment works, the Administrator shall promulgate pretreatment standards for the category of such sources simultaneously with the promulgation of standards of performance under section 1316 of this title for the equivalent category of new sources. Such pretreatment standards shall prevent the discharge of any pollutant into such treatment works, which pollutant may interfere with, pass through, or otherwise be incompatible with such works.

* * *

(7) Prior to establishing any regulations pursuant to this section the Administrator shall, to the maximum extent practicable within the time provided, consult with appropriate advisory committees, States, independent experts, and Federal departments and agencies.

(b)(1) The Administrator shall, within one hundred and eighty days after October 18, 1972, and from time to time thereafter, publish proposed regulations establishing pretreatment standards for introduction of pollutants into treatment works (as defined in section 1292 of this title) which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works. Not later than ninety days after such publication, and after opportunity for public hearing, the Administrator shall promulgate such pretreatment standards. Pretreatment standards under this subsection shall specify a time for compliance not to exceed three years from the date of promulgation and shall be established to prevent the discharge of any pollutant

through treatment works (as defined in section 1292 of this title) which are publicly owned, which pollutant interferes with, passes through, or otherwise is incompatible with such works. If, in the case of any toxic pollutant under subsection (a)of this section introduced by a source into a publicly owned treatment works, the treatment by such works removes all or any part of such toxic pollutant and the discharge from such works does not violate that effluent limitation or standard which would be applicable to such toxic pollutant if it were discharged by such source other than through a publicly owned treatment works, and does not prevent sludge use or disposal by such works in accordance with section 1345 of this title, then the pretreatment requirements for the sources actually discharging such toxic pollutant into such publicly owned treatment works may be revised by the owner or operator of such works to reflect the removal of such toxic pollutant by such works.

33 U.S.C. §1341

(a)(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or

other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other

State determine that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction

license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such li-

cense or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

* * *

(d) Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with

any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

33 U.S.C. §1343

(a) No permit under section 1342 of this title for a discharge into the territorial sea, the waters of the contiguous zone, or the oceans shall be issued, after promulgation of guidelines established under subsection (c) of this section, except in compliance with such guidelines. Prior to the promulgation of such guidelines, a permit may be issued under such section 1342 of this title if the Administrator determines it to be in the public interest.

(b) The requirements of subsection (d) of section 1342 of this title may not be waived in the case of permits for discharges into the territorial sea.

(c)(1) The Administrator shall, within one hundred and eighty days after October 18, 1972 (and from time to time thereafter), promulgate guidelines for determining the degradation of the waters of the territorial seas, the contiguous zone, and the oceans, which shall include:

(A) the effect of disposal of pollutants on human health or welfare, including but not limited to

plankton, fish, shellfish, wildlife, shorelines, and beaches;

(B) the effect of disposal of pollutants on marine life including the transfer, concentration, and dispersal of pollutants or their by-products through biological, physical, and chemical processes; changes in marine ecosystem diversity, productivity, and stability; and species and community population changes;

(C) the effect of disposal, of pollutants on esthetic, recreation, and economic values;

(D) the persistence and permanence of the effects of disposal of pollutants;

(E) the effect of the disposal at varying rates, of particular volumes and concentrations of pollutants;

(F) other possible locations and methods of disposal or recycling of pollutants including land-based alternatives; and

(G) the effect on alternate uses of the oceans, such as mineral exploitation and scientific study.

(2) In any event where insufficient information exists on any proposed discharge to make a reasonable judgment on any of the guidelines established pursuant to this subsection no permit shall be issued under section 1342 of this title.

Constitutional Provision and Statutes Involved

33 U.S.C. §1345

(a) Notwithstanding any other provision of this chapter or of any other law, in any case where the disposal of sewage sludge resulting from the operation of a treatment works as defined in section 1292 of this title (including the removal of in-place sewage sludge from one location and its deposit at another location) would result in any pollutant from such sewage sludge entering the navigable waters, such disposal is prohibited except in accordance with a permit issued by the Administrator under section 1342 of this title.

(b) The Administrator shall issue regulations governing the issuance of permits for the disposal of sewage sludge subject to subsection (a) of this section and section 1342 of this title. Such regulations shall require the application to such disposal of each criterion, factor, procedure, and requirement applicable to a permit issued under section 1342 of this title.

(c) Each State desiring to administer its own permit program for disposal of sewage sludge subject to subsection (a) of this section within its jurisdiction may do so in accordance with section 1342 of this title.

(d) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after December 27, 1977, and from time to time thereafter, regulations providing guidelines for the disposal of sludge and the utilization of sludge for various purposes. Such regulations shall—

(1) identify uses for sludge, including disposal;

(2) specify factors to be taken into account in determining the measures and practices applicable to each such use or disposal (including publication of information on costs);

(3) identify concentrations of pollutants which interfere with each such use or disposal.

The Administrator is authorized to revise any regulation issued under this subsection.

(e) The determination of the manner of disposal or use of sludge is a local determination except that it shall be unlawful for the owner or operator of any publicly owned treatment works to dispose of sludge from such works for any use for which guidelines have been established pursuant to subsection (d) of this section, except in accordance with such guidelines.

33 U.S.C §1365

(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controvery or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standards, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this sec-

tion respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

* * *

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

* * *

(g) For the purpose of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

33 U.S.C. §1401

(a) Unregulated dumping of material into ocean waters endangers human health, welfare, and amenities, and the marine environment, ecological systems, and economic potentialities.

(b) The Congress declares that it is the policy of the United States to regulate the dumping of all types of materials into ocean waters and to prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities.

(c) It is the purpose of this chapter to regulate (1) the transportation by any person of material from the United States and, in the case of United States vessels, aircraft, or agencies, the transportation of material from a location outside the United States, when in either case the transportation is for the purpose of dumping the material into ocean waters, and (2) the dumping of material transported by any person from a location outside the United States, if the dumping occurs in the territorial sea or the contiguous zone of the United States.

33 U.S.C. §1411

(a) Except as may be authorized by a permit issued pursuant to section 1412 or section 1413 of this title, and subject to regulations issued pursuant to section 1418 of this title,

> (1) no person shall transport from the United States, and
>
> (2) in the case of a vessel or aircraft registered in the United States or flying the United States flag or in the case of a United States department, agency, or instrumentality, no person shall transport from any location

any material for the purpose of dumping it into ocean waters.

(b) Except as may be authorized by a permit issued pursuant to section 1412 of this title, and subject to regulations issued pursuant to section 1418 of this title, no person shall dump any material transported from a location outside the United States (1) into the territorial sea of the United States, or (2) into a zone contiguous to the territorial sea of the United States, extending to a line twelve nautical miles seaward from the base line from which the breadth of the territorial sea is measured, to the extent that it may affect the territorial sea or the territory of the United States.

33 U.S.C. §1412

(a) Except in relation to dredged material, as provided for in section 1413 of this title, and in relation to radiological, chemical, and biological warfare agents and high-level radioactive waste, for which no permit may be issued, the Administrator may issue permits, after notice and opportunity for public hearings, for the transportation from the United States or, in the case of an agency or instrumentality of the United States, or in the case of a vessel or aircraft registered in the United States or flying the United States flag, for the transportation from a location outside the United States, of material for the purpose of dumping it into ocean waters, or for the dumping of material into the waters described in section 1411(b) of this title, where the Administrator determines that such dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine

environment, ecological systems, or economic potentialities. The Administrator shall establish and apply criteria for reviewing and evaluating such permit applications, and, in establishing or revising such criteria, shall consider, but not be limited in his consideration to, the following:

(A) The need for the proposed dumping.

(B) The effect of such dumping on human health and welfare, including economic, esthetic, and recreational values.

(C) The effect of such dumping on fisheries resources, plankton, fish, shellfish, wildlife, shore lines and beaches.

(D) The effect of such dumping on marine ecosystems, particularly with respect to—

(i) the transfer, concentration, and dispersion of such material and its byproducts through biological, physical, and chemical processes,

(ii) potential changes in marine ecosystem diversity, productivity, and stability, and

(iii) species and community population dynamics.

(E) The persistence and permanence of the effects of the dumping.

(F) The effect of dumping particular volumes and concentrations of such materials.

(G) Appropriate locations and methods of disposal or recycling, including land-based alternatives and the probable impact of requiring use of such

alternate locations or methods upon considerations affecting the public interest.

(H) The effect on alternate uses of oceans, such as scientific study, fishing, and other living resource exploitation, and nonliving resource exploitation.

(I) In designating recommended sites, the Administrator shall utilize wherever feasible locations beyond the edge of the Continental Shelf.

In establishing or revising such criteria, the Administrator shall consult with Federal, State, and local officials, and interested members of the general public, as may appear appropriate to the Administrator. With respect to such criteria as may affect the civil works program of the Department of the Army, the Administrator shall also consult with the Secretary. In reviewing applications for permits, the Administrator shall make such provision for consultation with interested Federal and State agencies as he deems useful or necessary. No permit shall be issue for a dumping of material which will violate applicable water quality standards. To the extent that he may do so without relaxing the requirements of this subchapter, the Administrator, in establishing or revising such criteria, shall apply the standards and criteria binding upon the United States under the Convention, including its Annexes.

(b) The Administrator may establish and issue various categories of permits, including the general permits described in section 1414(c) of this title.

(c) The Administrator may, considering the criteria established pursuant to subsection (a) of this section, des-

ignate recommended sites or times for dumping and, when he finds it necessary to protect critical areas, shall, after consultation with the Secretary, also designate sites or times within which certain materials may not be dumped.

(d) No permit is required under this subchapter for the transportation for dumping or the dumping of fish wastes, except when deposited in harbors or other protected or enclosed coastal waters, or where the Administrator finds that such deposits could endanger health, the environment, or ecological systems in a specific location. Where the Administrator makes such a finding, such material may be deposited only as authorized by a permit issued by the Administrator under this section.

(e) In the case of transportation of material, by a vessel or aircraft registered in the United States or flying the United States flag, from a location in a foreign State Party to the Convention, a permit issued pursuant to the authority of that foreign State Party, in accordance with Convention requirements, and which otherwise could have been issued pursuant to subsection (a) of this section, shall be accepted, for the purposes of this subchapter, as if it were issued by the Administrator under the authority of this section.

33 U.S.C. §1412a.

(a) The Administrator of the Environmental Protection Agency (hereinafter referred to in this section as the "Administrator") shall end the dumping of sewage sludge into ocean waters, or into waters described in section 1411 (b) of this title, as soon as possible after November 4, 1977, but in no case may the Administrator issue any per-

mit, or any renewal thereof (under Title I of the Marine Protection, Research, and Sanctuaries Act of 1972) which authorizes any such dumping after December 31, 1981.

(b) For purposes of this section, the term "sewage sludge" means any solid, semisolid, or liquid waste generated by a municipal waste-water treatment plant the ocean dumping of which may unreasonably degrade or endanger human health, welfare, amenities, or the marine environment, ecological systems, or economic potentialities.

33 U.S.C. §1415

(g)(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any prohibition, limitation, criterion, or permit established or issued by or under this subchapter. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such prohibition, limitation, criterion, or permit, as the case may be.

(2) No action may be commenced—

(A) prior to sixty days after notice of the violation has been given to the Administrator or to the Secretary, and to any alleged violator of the prohibition, limitation, criterion, or permit; or

(B) if the Attorney General has commenced and is diligently prosecuting a civil action in a court

of the United States to require compliance with the prohibition, limitation, criterion, or permit; or

(C) if the Administrator has commenced action to impose a penalty pursuant to subsection (a) of this section, or if the Administrator, or the Secretary, has initiated permit revocation or suspension proceedings under subsection (f) of this section; or

(D) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of this subchapter.

* * *

(3)(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Administrator or Secretary, may intervene on behalf of the United States as a matter of right.

* * *

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Administrator, the Secretary, or a State agency).

42 U.S.C. §7604

(a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

(b) No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation

occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limition, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 7412(c)(1)(B) of this title or an order issued by the Administrator pursuant to section 1413(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

* * *

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Adminstrator or a State agency). Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from—

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or

> (2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality,

against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernment entities, see section 7418 of this title.

• • •

N.J.S.A. 59:1-2

The Legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity. On the other hand the Legislature recognizes that while a private entrepreneur may readily be held liable for negligence within the chosen ambit of his activity, the area within which government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done. Consequently, it is hereby declared to be the public policy of this State that public entities shall only be liable for their negligence within the limitations of this act and in accordance with the fair and uniform principles established herein. All of the provisions of this act should be construed with a view to carry out the above legislative declaration.

Constitutional Provision and Statutes Involved

N.J.S.A. 59:1-3

* * *"Public entity" includes the State and any county, municipality, district, public authority, public agency, and any other political subdivision or public body in the State.

"State" shall mean the State and any office, department, division, bureau, board, commission or agency of the State, but shall not include any such entity which is statutorily authorized to sue and be sued.

N.J.S.A. 59:2-1

a. Except as otherwise provided by this act, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.

b. Any liability of a public entity established by this act is subject to any immunity of the public entity and is subject to any defenses that would be available to the public entity if it were a private person.

N.J.S.A. 59:8-3

No action shall be brought against a public entity under this act unless the claim upon which it is based shall have been presented in accordance with the procedure set forth in this chapter.

N.J.S.A. 59:8-8

A claim relating to a cause of action for death or for injury to person or to property shall be presented as provided in this chapter not later than the ninetieth day after

accrual of the cause of action. After the expiration of 6 months from the date notice of claim is received, the claimant may file suit in an appropriate court of law. The claimant shall be forever barred from recovering against a public entity if:

a. He failed to file his claim with the public entity within 90 days of accrual of his claim except as otherwise provided in section 59:8-9; or

* * *

N.J.S.A. 40:14A-7

Every Sewerage Authority shall be a public body politic and corporate constituting a political subdivision of the State established as an instrumentality exercising public and essential governmental functions to provide for the public health and welfare and shall have perpetual succession and have the following powers:

(1) To adopt and have a common seal and to alter the same at pleasure;

(2) To sue and to be sued;

* * *

Nos. 79-1711; 79-1754; 79-1760; 80-12 (Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MIDDLESEX COUNTY SEWERAGE AUTHORITY, *et al.*
Petitioners (79-1711)

v.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

JOINT MEETING OF ESSEX AND UNION COUNTIES,
Petitioner (79-1754)

v.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

CITY OF NEW YORK AND ABRAHAM BEAME,
Petitioners (79-1760)

v.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

ENVIRONMENTAL PROTECTION AGENCY, *et al.*
Petitioners (80-12)

v.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

MILTON B. CONFORD
Wilentz, Goldman & Spitzer
A Professional Corporation
900 Route 9
Woodbridge, New Jersey 07095
(201) 636-8000
Counsel for Petitioners, Middlesex County Sewerage Authority and *Township of Middletown Sewerage Authority*
VINCENT J. JENNINGS
Furman & Jennings,
Attorneys
FRANCIS X. JOURNICK
MARVIN J. BRAUTH
Of Counsel

ROBERT P. CORBIN
German, Gallagher & Murtagh
Suite 3100, 1818 Market Street
Philadelphia, Pennsylvania 19103
(215) 563-1000
Counsel for Respondents, National Sea Clammers Association and *Gosta Lovgren*
PHILIP A. RYAN
EDWARD C. GERMAN
DEAN F. MURTAGH
Of Counsel

(Additional Counsel Appear on the Reverse Side of this Cover)

PETITIONS FOR CERTIORARI FILED APRIL 29, 1980 (79-1711); MAY 5, 1980 (79-1754); MAY 5, 1980 (79-1760); JULY 3, 1980 (80-12)
CERTIORARI GRANTED OCTOBER 20, 1980

CHARLES C. CARELLA
Gateway 1, Suite 2404
Newark, New Jersey 07102
(201) 623-1700
Counsel for Petitioners,
Passaic Valley Sewerage Commissioners and *The Linden-Roselle Sewerage Authority*
RAYMOND G. TOMASZEWSKI
JOHN G. GILFILLAN, III
Of Counsel

STEPHEN J. MOSES
1 Essex Street
Hackensack, New Jersey 07601
(201) 343-6612
Counsel for Petitioner,
Bergen County Sewerage Authority
MENELAOS W. TOSKOS
Of Counsel

GEORGE J. MINISH
Minish and Wlliams
P.O. Box 236
614 Eagle Rock Avenue
West Orange, New Jersey 07052
(201) 736-9622
Counsel for Petitioner,
The Joint Meeting of Essex and Union Counties

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Petitioners,
Environmental Protection Agency, et al.
ANGUS MACBETH
Acting Assistant Attorney General
LOUIS F. CLAIBORNE
Deputy Solicitor General
ALAN I. HOROWITZ
Assistant to the Solicitor General
JACQUES B. GELIN
MARTIN GREEN
Of Counsel

ALLEN G. SCHWARTZ
Corporation Counsel of the City of New York
100 Church Street
New York, New York 10007
(212) 566-2091
Counsel for Petitioners,
City of New York and *Hon. Abraham Beame*
STEPHEN J. KRAMER
Of Counsel

INDEX

	PAGE
Relevant Docket Entries in Court of Appeals	1a
Relevant Docket Entries in District Court	6a
Complaint	18a
Note Concerning Opinion and Judgment of Court of Appeals and Opinion and Order of District Court	47a
Order Granting Writs	48a

JOINT APPENDIX

Relevant Docket Entries in Court of Appeals

Case No. 79-1360

Date	*Filings—Proceedings*
3-21-79	Certified copy of Notice of Appeal, received February 20, 1979, filed.
	Record, received March 12, 1979, filed.
	Appearance of James M. Marsh, and Dean F. Murtagh, Esqs.; LaBrum and Doak for appellants, filed.
	• • •
4-30-79	Brief for appellant, filed. Service of brief and appendix by mail on 4-30-79 attached.
4-30-79	Appendix, filed.
5-29-79	Brief for appellee (and supplemental appendix, received for the information of the Court), The Linden Roselle Sewerage Authority, filed. (25cc.)
5-29-79	Brief for appellees, City of New York and Abraham Beame, filed. (25cc.) Service of brief by mail on 5-29-79 attached.
5-30-79	Brief for appellee, Passaic Valley Sewerage Commissioners, filed. (25cc.)
5-30-79	Supplemental appendix for appellee, Passaic Valley Sewerage Commissioners, received for the information of the Court. (10cc.) Not filed unless Ct. directs.
	• • •

Relevant Docket Entries in Court of Appeals

Date	*Filings—Proceedings*
5-31-79	Brief for appellee, City of Long Beach, rec'd June 4, 1979, filed. Service by mail on 5-31-79 attached.
6-4-79	Letter dated June 1, 1979 from Vincent J. Jennings, Esq., counsel for appellee, Township of Middletown Sewerage Authority, advising that he will rely on the arguments set forth in the U. S. District Court's opinion which disposes of all the arguments advanced in the appellant's brief and will not burden the Court with a brief on this subject, rec'd.
	* * *
6-4-79	Brief for appellee, The Joint Meeting of Essex and Union Counties, filed.
6-8-79	Reply brief for appellants, filed. Service by mail on 6-8-79 attached.
	* * *
6-21-79	Brief for appellee, Bergen County Utilities Authority, rec'd June 7, 1979, filed.
	* * *
5-31-79	Brief for appellee, Middlesex County Sewerage Authority, filed. Service of brief (and appendix) by mail on May 31, 1979 attached.
	* * *

Relevant Docket Entries in Court of Appeals

Date	*Filings—Proceedings*
7-3-79	Appendix for appellee, Middlesex County Sewerage Authority, (incorporated within the brief filed 5-31-79), rec'd May 31, 1979, filed.
	* * *
7-10-79	Appendix for appellee, The Joint Meeting of Essex & Union Counties, received June 4, 1979, filed. (10cc)
	* * *
8-2-79	Brief for appellees, United States Environmental Protection Agency, Russell E. Train, United States Army Corps of Engineers and Martin R. Hoffman, rec'd July 25, 1979, filed. Service by mail on 7-20-79 attached.
8-6-79	Copy of Environmental Impact Statement on the Ocean Dumping of Sewage Sludge in the New York Bight (Final ed., September 1978), rec'd from Ralph A. Jacobs, Esq., for the information of the Court. (4cc)
	* * *
10-16-79	Argued. Coram: Gibbons and Higginbotham, C.J. and Weiner, D.J.
	* * *
2-5-80	Opinion of the Court (*Gibbons* and Higginbotham, C.J. and Weiner, D.J.*), filed.

*Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Relevant Docket Entries in Court of Appeals

Date	*Filings—Proceedings*
2-5-80	Judgment affirming the judgment of the District Court filed January 9, 1979, as to that portion of the judgment dismissing the Refuse Act claim, the Federal Tort claims Act and state tort claims act claims, and the constitutional claims; reversing that part of the judgment dismissing the complaint to the extent that it dismissed plaintiffs' claims under the Federal Water Pollution Control Act, the Marine Protection, Research and Sanctuaries Act, their common law nuisance claims and their maritime tort claims; vacating that portion of the judgment dismissing the National Environmental Policy Act claim and remanding that claim for consideration of the record developed on remand; and remanding the cause to the district court for further proceedings, consistent with the opinion of this Court, filed.
	* * *
3-21-80	Certified judgment in lieu of formal mandate issued.
	* * *
5-6-80	Notice of filing on April 29, 1980 of petition for writ of certiorari, rec'd from Clerk of the S.C., filed. (S.C. No. 79-1711)
5-9-80	Notice of filing on May 5, 1980 of petition for writ of certiorari, rec'd from Clerk of the S.C., filed. (S.C. No. 79-1754)

Relevant Docket Entries in Court of Appeals

Date	*Filings—Proceedings*
5-12-80	Notice of filing on May 5, 1980 of petition for writ of certiorari, rec'd from Clerk of the S.C., filed. (S.C. No. 79-1760)
7-15-80	Notice of filing on July 3, 1980 petition for writ of certiorari, rec'd from Clerk of the S.C., filed. (S.C. No. 80-12)

(SEAL)

A True Copy:

M. ELIZABETH FERGUSON
Chief Deputy Clerk

Relevant Docket Entries in District Court

DOCKET No. 77-0126

NATIONAL SEA CLAMMERS ASSOCIATION and GOSTA LOVGREN,

Plaintiffs,

CITY OF NEW YORK, HONORABLE ABRAHAM BEAME, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RUSSELL E. TRAIN, individually and as ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES ARMY CORPS OF ENGINEERS, DAVID J. BARDIN, BERGEN COUNTY SEWER AUTHORITY, THE JOINT MEETING OF ESSEX AND UNION COUNTIES, PASSAIC VALLEY SEWERAGE COMMISSIONERS, MIDDLESEX COUNTY SEWERAGE AUTHORITY, THE LINDEN ROSELLE SEWERAGE AUTHORITY, MIDDLETOWN SEWERAGE AUTHORITY, WEST LONG BEACH SEWER DISTRICT, COUNTY OF WESTCHESTER, Dept. of ENVIRONMENTAL FAC., CITY OF LONG BEACH AND CITY OF GLEN COVE,

Defendants.

Cause

Action to enjoin defendants from coastal sewage and sludge dumping

Attorneys

Shackleton, Hazeltine and Zlotkin
22nd Street and Long Beach Blvd.
Ship Bottom, New Jersey 08008
609-494-2136

Relevant Docket Entries in District Court

Raymond G. Tomaszewski, Esq.
812 North Wood Avenue
P. O. Box 626
Linden, N. J. 07036
(Linden Roselle Sewerage Auth.)

Carella, Bain, Gilfillan & Rhodes, PA
Gateway 1—Suite 2404
Newark, N. J. 07102
(Passaic Valley Sew. Com.)

Furman & Jennings, Esqs.,
110 Highway 35, P.O. Box 755, Red Bank
(Township of Middletown Sewerage)

Stephen J. Moses, Esq.
1 Essex Street
Hackensack, N. J. 07601
(Bergen County Sewer County)

Wilentz, Goldman & Spitzer, Esqs.
252 Madison Ave.
Perth Amboy, N. J. 08862
(Middlesex County Sewerage Authority)

Philip Kaufman, Esq.
3 Norwood Ave.
Spotswood, N. J. 08884
(City of N.Y. and Abraham Beame)

George J. Minish, Esq.
614 Eagle Rock Avenue
West Orange, N. J. 07052
(Joint Meeting of Essex & Union Counties)

Relevant Docket Entries in District Court

Jamieson, McCardell, Moore, Peskin & Spicer, Esqs.
19 Chancery Lane
Trenton, N. J. 08618
(City of Glen Cove)

Allan L. Tumarkin, Esq.
290 S. Livingston Ave.
Livingston, N. J. 07039
(City of Long Beach)

U. S. ATTORNEY (for federal defendants)

Date	*Proceedings*
1-21-77	Complaint filed 1-14-77.
	• • •
1-21-77	Demand for trial by *Jury* filed 1-20-77.
1-21-77	Notice of Allocation and Assignment filed 1-20-77. (Newark—Meanor)
2-7-77	Summons returned served on Martin R. Hoffman, United States Army Corps of Engineers, Russell E. Train and United States Environmental Protection Agency all on 1-27-77 filed.
	• • •
2-15-77	*Answer* of defendant, The Joint Meeting of Essex and Union Counties and proof of service filed 2-14-77.

Relevant Docket Entries in District Court

Date	*Proceedings*
2-17-77	*Answer* of defendant, Passaic Valley Sewerage Commissioners to the complaint; *crossclaims* against defendants, Environmental Protection Agency, Russell E. Train, Army Corps of Engineers, Martin R. Hoffman, New Jersey Department of Environmental Protection and David J. Bardin and proof of service filed 2-16-77.
2-18-77	*Answer* of defendant, Township of Middletown Sewerage Authority to the complaint and proof of service filed.
	• • •
3-1-77	*Answer* of defendant, Middlesex County Sewerage Authority, *crossclaims* against defendants, Environmental Protection Agency, Russell E. Train, Army Corps of Engineers, Martin R. Hoffman, New Jersey Department of Environmental Protection and David J. Bardin and proof of service filed 2-28-77.
3-1-77	*Answer* of defendant, The Linden Roselle Sewerage Authority to the complaint; *crossclaims* against defendants, Environmental Protection Agency, Russell E. Train, Army Corps of Engineers, Martin R. Hoffman, New Jersey Department of Environmental Protection and David J. Bardin and proof of service filed.
3-7-77	*Answer* of defendant, Joint Meeting of Essex and Union Counties to crossclaim of defendant Passic Valley Sewerage Commissioners filed.
	• • •

Relevant Docket Entries in District Court

Date	*Proceedings*
3-11-77	*Answer* of defendant, Linden Roselle Sewerage Authority to crossclaim of defendant, Passaic Valley Sewerage Commissioners filed 3-10-77.
	* * *
3-15-77	*Answer* of defendant, Joint Meeting of Essex and Union Counties to crossclaim of defendant, Linden Roselle Sewerage Authority filed.
3-17-77	*Answer* of defendant, Joint Meeting of Essex and Union Counties to crossclaim of defendant, Middlesex County Sewerage Authority filed 3-16-77.
3-17-77	*Answer* of defendant, Joint Meeting of Essex and Union Counties to crossclaim of defendant, City of Glen Cove filed 3-16-77.
	* * *
3-18-77	*Answer* of defendant, Linden Roselle Sewerage Authority to crossclaim of defendant, City of Glen Cove filed.
3-18-77	*Answer* of defendant, Linden Roselle Sewerage Authority to crossclaim of defendant, Middlesex County Sewerage Authority filed.
3-24-77	*Answer* of defendant, Bergen County Sewer Authority to the complaint; *crossclaims* against all other defendants and proof of service filed 3-23-77.
	* * *

Relevant Docket Entries in District Court

Date	*Proceedings*
3-28-77	*Answer* of defendant, Passaic Valley Sewerage Commissioners to crossclaim of defendant, City of Glen Cove and proof of service filed.
	• • •
3-29-77	*Answer* of defendant, Passaic Valley Sewerage Commissioners to crossclaim of defendant, Bergen County Sewer Authority and proof of service filed.
4-5-77	*Answer* of defendant, Joint Meeting of Essex and Union Counties to crossclaim of Bergen County Sewer Authority filed 4-4-77.
4-5-77	*Answer* of defendant, Linden Roselle Sewerage Authority to crossclaim of Bergen County Sewer Authority, filed.
4-11-77	Consent Order substituting attorney for Defendant Middlesex County Sewerage Authority, filed 4-7-77. (Meanor) Notice Mailed.
4-12-77	Plaintiff's notice of dismissal of action as to defendants, New Jersey Department of Environmental Protection and David J. Bardin, as Commissioner, filed 4-11-77.
	• • •
4-19-77	*Answer* of defendants The City of New York and Honorable Abraham Beame, filed 4-18-77.

Relevant Docket Entries in District Court

Date	*Proceedings*
5-3-77	*Order dismissing Complaint and all cross-claims against* the Defendants New Jersey Department of Environmental Protection, David J. Bardin, individually and as Commissioner of the New Jersey Department of Environmental Protection, the New York Department of Environmental Conservation and Ogden R. Reid, individually and as Commissioner of the New York Department of Environmental Conservation, without costs, filed 4-26-77. (Meanor) Notice Mailed.
5-9-77	Notice of motion of defendant, Passaic Valley Sewerage Commissioners for dismissal of complaint, returnable 6-13-77, and proof of service filed. (Brief submitted)
	* * *
5-17-77	Notice of Motion of Defendant Middlesex County Sewerage Authority, to dismiss complaint, returnable 6-13-77, statement in lieu of brief, and affidavit of service filed 5-16-77.
5-18-77	Notice of Motion of Defendant Joint Meeting of Essex and Union Counties to dismiss complaint, returnable 6-13-77 and certificate of service filed 5-17-77. (Statement in lieu of brief)
	* * *
5-23-77	Notice of Motion of Defendant Bergen County Sewer Authority to dismiss complaint, returnable 6-13-77, and certificate of service filed. (Brief Submitted)

Relevant Docket Entries in District Court

Date	*Proceedings*
5-25-77	Notice of motion of Defendant Linden Roselle Sewerage Authority for dismissal of action, returnable 6-13-77, statement in lieu of brief and affidavit of service, filed 5-24-77.
	• • •
5-27-77	Notice of Motion of Defendant, Township of Middletown Sewerage Authority to dismiss complaint, returnable 6-27-77, and certificate of service filed 5-25-77. (Brief of Passaic Valley Severage Authority to be relied upon)
	• • •
11-10-77	Notice of motion of Defendant Passaic Valley Sewerage Commissioners for dismissal of complaint, returnable 11-28-77, and certificate of service filed 11-9-77. (Brief submitted)
	• • •
1-3-78	*Amended answer* of defendant The Joint Meeting of Essex and Union Counties and *crossclaim* against co-defendants, filed.
	• • •
1-10-78	*Answer* of defendant Passaic Valley Sewerage Commissioners to crossclaim of defendant, Joint Meeting of Essex and Union Counties, filed 1-9-78.

Complaint

Relevant Docket Entries in District Court

Date	*Proceedings*
1-16-78	*Answer* of defendant Linden Roselle Sewerage Authority to crossclaim of defendant, Joint Meeting of Essex and Union Counties, filed 1-13-78.
	• • •
3-15-78	Notice of motion of defendant Bergen County Sewer Authority for dismissal of action, returnable 4-10-78, and proof of service filed 3-14-78. (Brief Submitted)
	• • •
3-16-78	Notice of motion of defendant Passaic Valley Sewerage Commissioners for dismissal of all counts of complaint, returnable 4-10-78, and certificate of service filed 3-15-78. (Brief submitted)
	• • •
3-16-78	Notice of motion of defendant The Linden Roselle Sewerage Authority to dismiss complaint, returnable 4-10-78, brief and affidavit of mailing filed 3-15-78.
3-17-78	Notice of motion of defendant Joint Meeting of Essex and Union Counties for dismissal of complaint, returnable 4-10-78, and certificate of mailing filed 3-16-78. (Brief Submitted)

Relevant Docket Entries in District Court

Date	*Proceedings*
3-20-78	Notice of motion of defendants the City of New York and Hon. Abraham Beame, for dismissal of action, returnable 4-10-78, and affidavit of service filed 3-20-78. (To Rely on brief filed in support of their motion for summary judgment)
	• • •
4-3-78	Notice of motion of the defendant Township of Middletown Sewerage Authority for dismissal of complaint, returnable 4-24-78, statement in lieu of brief and certificate of mailing, filed 3-29-78.
4-3-78	Notice of motion of defendant Middlesex County Sewerage Authority for dismissal of complaint, returnable 4-24-78, statement in lieu of brief and certificate of mailing filed 3-29-78.
	• • •
8-15-78	Opinion filed 8-14-78. (Meanor) (Dismissing action)
8-29-78	*Order granting motion of defendant Middlesex County Sewerage Authority* for summary judgment with costs in favor of the defendant Midsex County Sewerage Authority and against the plaintiffs National Sea Clammers Association and Gosta Lovgren, filed 8-28-78. (Meanor) Notice Mailed.
	• • •

Relevant Docket Entries in District Court

Date	*Proceedings*
9-5-78	*Order for dismissal of action with costs in favor of defendant* The Linden Roselle Sewerage Authority and against plaintiffs National Sea Clammers Association and Gosta Lovgren filed 8-31-78. (Meanor) Notice mailed
	• • •
1-11-79	Order amending Opinion of August 14, 1978, filed 1-9-79. (Meanor) (Notice mailed)
1-11-79	Order dismissing Complaint in favor of defendants, City of New York Honorable Edward Koch, United States Environmental Protection Agency, Russell E. Train, individually and as Administrator of the United States Environmental Protection Agency, United States Army Corps of Engineers, Bergen County Sewer Authority, The Joint Meeting of Essex and Union Counties, Passaic Valley Sewerage Commissioners, Middletown Sewerage Authority, West Long Beach Sewer District, County of Westchester, City of Long Beach, City of Glen Cove, and Martin R. Hoffman, individually and as Secretary of the United States Department of the Army, and against, plaintiffs, National Sea Clammers Association and Gosta Lovgren, with costs; and dismissing all crosselaims, without costs, filed 1-9-79. (Meanor) (Notice mailed)
2-15-79	Plaintiffs' Notice of appeal filed 2-9-79 at 2:30 p.m.

Relevant Docket Entries in District Court

Date	*Proceedings*
3-9-79	Record on Appeal sent to U.S.C.A. (Notice mailed)

I HEREBY CERTIFY that the above and foregoing is a true and correct copy of the original on file in my office.

ATTEST:

ANGELO W. LOCASCIO, Clerk
United States District Court
District of New Jersey
By: JONATHAN D. DAVIS
Deputy Clerk

Complaint

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Jurisdiction

1. This action also arises under the laws of the United States, more particularly the National Environmental Policy Act of 1969, Title 42, U.S.C., §4321, et. seq., the Federal Water Pollution Control Act, as amended, Title 33, U.S.C., §2151, et seq., the Marine Protection, Research, and Sanctuaries Act of 1972 (Ocean Dumping Act), Title 33, U.S.C., §1401, et seq., and the Rivers and Harbors Act of 1899 (Refuse Act), Title 33, U.S.C., §407.

2. The jurisdiction of this Court is invoked under Title 28, U.S.C., §1331(a) as this action arises under the Constitution of the United States, more particularly Article VI, Clause 2, the Ninth Amendment, the Fifth Amendment, and the Fourteenth Amendment, under Title 28, U.S.C., §1343 and Title 42, U.S.C., §1983, under Title 28, U.S.C., §1333(1) and Title 46, U.S.C., §740 (The Extension of Admiralty and Maritime Jurisdiction Act), under Title 28, U.S.C., §1346(b) and Title 28, U.S.C., §2671, et. seq. (Federal Tort Claims Act), under Title 28, U.S.C., §1337, under Title 5, U.S.C., §701 et. seq. (Administrative Procedure Act), and under Title 28, U.S.C., §1361 (Mandamus), and under Title 28, U.S.C., §1332.

3. The notice requirements and presentation of claim requirements have been complied with.

Complaint

Plaintiffs

4. Plaintiff, National Sea Clammers Association, is an incorporated association which has its principal office in Absecon, Atlantic County, New Jersey and brings this action on behalf of its members and on behalf of the class.

5. Plaintiff, Gosta Lovgren, is a citizen of the United States and of New Jersey and resides in Point Pleasant, Ocean County, New Jersey. Plaintiff is a member of the National Sea Clammers Association and brings this action on his own behalf and on behalf of the members of the class.

Defendants

6. Defendant, City of New York, hereinafter referred to as NYC, is a municipal corporation, organized and existing under and by virtue of the laws of the State of New York and has a population in excess of 9,900,-000.

7. Defendant, Abraham Beame, hereinafter referred to as Beame, is a citizen of the State of New York and is the Mayor of the City of New York.

8. Defendant, Environmental Protection Agency, hereinafter referred to as EPA, is a federal agency created under the provisions of Title 5, U.S.C., §901 et seq.

9. Defendant, Russell E. Train, hereinafter referred to as Train, is the Administrator of the Environmental Pro-

tection Agency created by and in accordance with the provisions of Title 5, U.S.C., §901 et. seq.

10. Defendant, Army Corp of Engineers, hereinafter referred to as Army Corps, is an agency of the United States Government created under the provisions of Title 40, U.S.C., §51.

11. Defendant, Martin R. Hoffman, hereinafter referred to as Hoffman, is Secretary of the Army of the Department of the Army, a position created by and in accordance with Title 10, U.S.C., §3012.

12. Defendant, New York Department of Environmental Conservation, hereinafter referred to as NYDEC, is an agency of the State of New York created under the provisions of the State of New York's Environmental Conservation Law, §3-0101 et. seq.

13. Defendant, Ogden R. Reid, hereinafter referred to as Reid, is the Commissioner of the New York Department of Environmental Conservation created by and in accordance with the provisions of the State of New York's Environmental Conservation Law §3-0101 et. seq.

14. Defendant, New Jersey Department of Environmental Protection, hereinafter referred to as NJDEP, is an agency of the State of New Jersey created under the provisions of Title 13, N.J.S.A., §1D-1 et seq.

15. Defendant, David J. Bardin, hereinafter referred to as Bardin, is the Commissioner of the New Jersey Department of Environmental Protection created by and in accordance with the provisions of Title 13, N.J.S.A., §1 D-1 et seq.

16. Defendants, Bergen County Sewer Authority, hereinafter referred to as Bergen Co., The Joint Meeting of Essex and Union Counties, hereinafter referred to as Essex Co., Passaic Valley Sewerage Authority, hereinafter referred to as Passaic Val., Middlesex County Sewerage Authority, hereinafter referred to as Middlesex Co., The Linden Roselle Sewage Authority, hereinafter referred to as Linden Roselle, and Middletown Sewerage Authority, hereinafter referred to as Middletown, are all governmental units in the State of New Jersey organized and existing under and by virtue of the laws of the State of New Jersey.

17. Defendants, West Long Beach Sewer District, hereinafter referred to as W. Long Beach, County of Westchester Department of Environmental Facilities, hereinafter referred to as Westchester Co., City of Long Beach, hereinafter referred to as Long Beach, and City of Glen Cove, hereinafter referred to as Glen Cove, are all governmental units in the State of New York organized and existing under and by virtue of the laws of the State of New York.

Class Action Allegation

18. Plaintiffs bring this action on their own behalf and as a class action on behalf of others similarly situated, in accordance with the provisions of Rule 23(a) and (b) of the Federal Rules of Civil Procedure.

19. The persons who constitute the class are so numerous that joinder of all members is impracticable; there are questions of law and fact common to the entire class;

the claims of plaintiff are typical of the claims of the entire class; and plaintiff will fairly and adequately protect the interests of the entire class.

20. Separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class.

21. The questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for fair and efficient adjudication of the controversy.

COUNT I

22. Defendants, New York City and Beame, have in the past and continue to own, operate, and control a sewage system which provides the means for the removal of the City's waste products.

23. Defendants, Glen Cove, Long Beach, W. Long Beach, Westchester Co., Bergen Co., Essex Co., Passaic Val., Middlesex Co., Linden Roselle and Middletown have in the past and continue to own, operate, and control sewage systems which provide the means for the removal of waste products from areas over which they exercise authority.

24. Defendants, New York City, Beame, Glen Cove, Long Beach, W. Long Beach, Westchester Co., Bergen Co., Essex Co., Passaic Val., Middlesex Co., Linden Roselle and

Middletown, have in the past and continue to cause sewage, sludge, and waste materials, some of which are toxic, to be discharged into the Hudson River, a navigable waterway and natural resource situated to the west of New York City, and into New York Harbor, a navigable waterway and natural resource situated to the south of New York City by means of the overflow and outfall systems connected with the operation of the sewage systems.

25. Such sewage and sludge which is released into the Hudson River and New York Harbor is carried into the waters of the Atlantic Ocean, a navigable body of water and natural resource, situated off the east coast of the United States.

26. Defendants, New York City, Beame, Glen Cove, Long Beach, W. Long Beach, Westchester Co., Bergen Co., Essex Co., Passaic Val., Middlesex Co., Linden Roselle and Middletown, conduct the discharge of sewage, sludge, and waste material including toxic substances through the overflow and outfall systems with the consent, approval, and direction of the NYDEC and Reid, Commissioner, which agency of the State of New York has the responsibility of enforcing the regulation of such discharge under the New York Statute, Environmental Conservation Law, §1-0101, et seq., and with the consent, approval and direction of the EPA and Train, Administrator, which agency of the United States government has the responsibility of creating and enforcing standards and regulations of such discharge under the Water Pollution Control Act, Title 33, U.S.C., §1251 et. seq.

27. Defendants, New York City, Beame, Glen Cove, Long Beach, W. Long Beach, Westchester Co., Bergen Co., Es-

sex Co., Passaic Val., Middlesex Co., Linden Roselle and Middletown, have in the past and continue to cause sewage, sludge, dredged materials, and waste material including toxic substances to be dumped into the Atlantic Ocean by means of conveyance upon maritime vessels.

28. Defendants, New York City, Beame, Glen Cove, Long Beach, W. Long Beach, Westchester Co., Bergen Co., Essex Co., Passaic Val., Middlesex Co., Linden Roselle and Middletown, conduct the dumping of sewage, sludge, dredged material and waste including toxic substances into the Atlantic Ocean with the consent, approval and direction of the defendants EPA and Train and defendants Army Corps and Hoffmann, which agencies of the United States government have the responsibility of creating and enforcing standards and regulations regarding ocean dumping under the Marine Protection, Research, and Sanctuaries Act, Title 33, U.S.C., §1401 et. seq.

29. Defendant, Army Corps, has and continues to conduct and control dredging operations in New York Harbor.

30. Defendant, Army Corps, has and continues to cause dredged sludge, sewage sludge, and waste material including toxic substances to be dumped into the Atlantic Ocean by means of conveyance upon maritime vessels.

31. Defendant, Army Corps, conducts such dredging operation and dumping operation with the consent, approval, and direction of the EPA and Train and Hoffman, which parties have the responsibility of creating and enforcing standards and regulations regarding ocean dumping under the Marine Protection, Research, and Sanctuaries Act, Title 33, U.S.C., §1401, et. seq.

32. The waters of the Atlantic Ocean have always been and remain an integral part of the ecologically balanced biosphere, have always possessed a complex yet flexible system whereby life is propagated and sustained, and have always possessed the ability to cleanse and purify themselves and eleminate the adverse effects created by pollutants.

33. The waters of the Atlantic Ocean have provided and continue to provide the people of this nation and the people of New Jersey and, more particularly, the people who use the waters, with a source of enjoyment, comfort, inspiration, recreation, employment, and sustenance, and thereby, such waters have been and remain a vital asset to the people and sovereign in whom traditionally has rested the duty to protect such natural resource and public trust.

34. In and about the summer of 1976, it was discovered that the marine environment of the Atlantic Ocean was being inundated by a massive rapid growth of algae which was described as a "black mass" and a "blanket of algae".

35. Such algae growth covered an area of the Atlantic Ocean ranging from approximately the southwest portion of Long Island, New York to a point approximately due east of Cape May, New Jersey, and extending from a few miles offshore to more than 20 miles out to sea.

36. Such algae growth was caused and continues to be caused by the nutrient-rich sewage and other waste materials, including toxic substances, deposited in the waters of the Atlantic Ocean by defendants New York City, Beame, Glen Cove, Long Beach, W. Long Beach, Westchester Co.,

Bergen Co., Essex Co., Passaic Val., Middlesex Co., Linden Roselle and Middletown.

37. Such discharged sewage, sludge, dredged material, and other waste materials, including toxic substances, as well as the algae growth, have caused and continue to cause an ecological imbalance and a condition which interferes with the cleansing processes and capabilites of the waters and thereby have produced and continue to produce a marine environment which is adverse for the maintenance of marine life.

38. Such discharged sewage, sludge, dredged material, and other wastes including toxic substances and the algae growth have caused and continue to cause harmful layers of sediment and harmful accumulations of sludge on the ocean floor which have had and continue to have an adverse impact on the marine environment and its ability to maintain life.

39. Such discharged sewage, sludge, dredged materials and other waste, including toxic materials and the algae growth, have caused and continue to cause massive destruction of marine plant life, fish, clams, lobsters and other marine life unable to escape and thereby, has caused and continues to cause the collapse of the fishing, clamming and lobster industries which operate in the waters of the Atlantic Ocean.

40. Such discharged sewage, sludge, dredged material and other wastes including toxic materials, and the algae growth, have caused and continue to cause the pollution and the destruction of the property held in trust by the sovereign for the public benefit.

41. Such discharged sewage, sludge, dredged material, other wastes including toxic materials, and the algae growth as well as the polluted and destroyed ocean environment have caused and continue to cause noxious and offensive odors as well as noxious and offensive sights which adversely affect those who come in contact with the Atlantic Ocean.

42. Defendants, New York City, Beame, Glen Cove, Long Beach, W. Long Beach, Westchester Co., Bergen Co., Essex Co., Passaic Val., Middlesex Co., Linden Roselle and Middletown, by such discharged sewage, sludge, dredged material, other wastes including toxic materials and algae growth as well as the polluted and destroyed ocean environment have caused and continue to cause a nuisance, annoyance, inconvenience, and harm to the safety, welfare, health, and comfort of the public and of those who use or encounter the ocean waters which constitute the public trust and more particularly of plaintiffs and all within the class.

43. The plaintiffs and all within the class have been and continue to be engaged in taking fish, digging clams, and catching lobsters as a vocation and source of livelihood in the waters of the Atlantic Ocean held in trust for the public benefit.

44. Nevertheless, the plaintiffs and all within the class have been and continue to be engaged in a use of the public trust different from that of the general public and have had and continue to have vested expectations arising out of the public's fishing and navigational rights which are different in kind from those of the public in general.

45. The plaintiffs and all within the class as well as the general public have suffered vast damage and harm to their health, safety, welfare, property and livelihood as well as an infringement of their vested rights and interference with their use of the public trust by the actions of defendants as described in Paragraphs 23 through 45 above.

46. Defendants have known that the operation of the respective sewage systems and dredging operations have caused such polluted waters and destruction of the public trust and harm and damage to the plaintiffs and yet, defendants continue to conduct such hazardous operations and consent to and approve same.

47. The plaintiffs and all within the class have objected and continue to object to the continuing discharge of such sewage, sludge, and other toxic waste materials.

48. The pollution and nuisance caused by defendant New York City as described above in Paragraphs 23 through 47 raises a federal question under Title 28, U.S.C., §1331.

COUNT II

49. Plaintiff incorporates the allegations of Paragraphs 1 through 48 of the Complaint against defendants and makes the same a part hereof.

50. Defendants New York City, Beame, Glen Cove, Long Beach, W. Long Beach, Westchester Co., Bergen Co., Essex Co., Passaic Val., Middlesex Co., Linden Roselle and Middletown, and the Army Corps have thrown, discharged

and deposited and continue to throw, discharge and deposit refuse matter of any kind or description whatever, other than that flowing from the streets and sewers passing therefrom in a liquid state, into the Hudson River and into the Atlantic Ocean.

51. Such deposits of refuse in such navigable waters violates the Rivers and Harbors Act of 1899, Title 33, U.S.C., §407.

52. On account of such violations by defendants and due to the pollution and deterioration of the marine environment, plaintiffs and all within the class as well as the public in general have suffered and continue to suffer vast damages and harm to their health, safety, welfare, property and livelihood, as well as an infringement of their vested rights and an interference with their use of the public trust.

COUNT III

53. Plaintiff incorporates the allegations of Paragraphs 1 through 52 of the Complaint against defendants and makes them the same a part hereof.

54. Defendants EPA, Train, Army Corps, and Hoffmann are charged with the responsibility of carrying out the objectives of the Marine Protection, Research, and Sanctuaries Act, Title 33, U.S.C., §1401, et seq. which are to prevent or strictly limit the ocean dumping of any material which would adversely affect human health, welfare, or amenities or the marine environment, ecological systems, or economic potentialities.

55. Nevertheless, defendants EPA, Train, Army Corps, and Hoffmann have knowingly, negligently, and wrongfully violated and continue to violate the provisions of the Marine Protection, Research, and Sanctuaries Act in the following manner:

(a) Defendants have failed to develop comprehensive programs and to promulgate regulations and to require sufficient assessments of environmental impact in accordance with the Marine Protection, Research, and Sanctuaries Act to prevent, reduce, and eliminate pollution of navigable waters including the Atlantic Ocean.

(b) Defendants have failed to enforce the standards, to compel compliance, and to take affirmative action to reduce and eliminate violations of the Marine Protection, Research, and Sanctuaries Act despite awareness and knowledge of continued violations and increasing pollution.

(c) Defendants have failed to provide proper means of monitoring and gathering information as required by the Marine Protection, Research, and Sanctuaries Act.

(d) Defendants have repeatedly exceeded their authority as expressly provided in the Marine Protection, Research, and Sanctuaries Act.

(e) In particular, defendants have taken no action, despite enforcement powers, to object to or to set aside the granting of and approval of permits issued to conduct ocean dumping operations as described in Count I above.

56. On account of such violations by defendants and the ensuing pollution and deterioration of the marine environment, plaintiffs and all within the class as well as the public in general have suffered and continue to suffer vast damages and harm to their health, safety, welfare and property and livelihood, as well as an infringement of their vested vested rights and an interference with their use of the public trust.

COUNT IV

57. Plaintiff incorporate the allegations in Paragraphs 1 through 56 of the Complaint against defendants and makes the same a part hereof.

58. Defendants, EPA and Train, are charged with the responsibility of carrying out the objectives of the Water Pollution Control Act, Title 33, U.S.C., §1251 which are to restore and maintain the chemical, physical, and biological integrity of the waters of the United States and to prevent, reduce and eliminate pollution and thereby to restore, preserve and enhance the water resources of the United States.

59. Nevertheless, defendants, EPA and Train, have knowingly, negligently, and wrongfully violated and continue to violate the provisions of the Water Pollution Act in the following manner:

(a) Defendants have failed to develop comprehensive programs and to promulgate regulations and to require sufficient assessments of environmental impact in accordance with the Water Pollution Control Act to prevent, reduce, and eliminate pollution

of navigable waters including the Atlantic Ocean, Hudson River, and New York Harbor.

(b) Defendants have failed to enforce the standards, to compel compliance, and take affirmative action to reduce and eliminate violations of the Water Pollution Control Act despite awarness and knowledge of continued violations and increasing pollution.

(c) Defendants have failed to provide proper means of monitoring and gathering information as required by the Water Pollution Control Act.

(d) Defendants have repeatedly exceeded their authority as expressly provided in the Water Pollution Control Act.

(e) In particular, defendants have taken no action, despite enforcement powers, to object to or to set aside the granting of and approval of permits issued to conduct the discharging of sewerage as described in Count I above.

60. On account of such violations by defendants and the ensuing pollution and deterioration of the marine environment, plaintiffs and all within the class as well as the public in general have suffered and continue to suffer vast damages and harm to their health, safety, welfare, property and livelihood, as well as an infringement of their vested rights and an interference with their use of the public trust.

COUNT V

61. Plaintiff incorporates the allegations of Paragraphs 1 through 60 of the Complaint against the defendants and makes the same a part hereof.

62. The defendants, NYDEC and Reid, are charged with the responsibility to exercise general supervision and control over the waters of New York, to make and enforce rules and regulations to correct and prevent pollution of such waters, and to exercise the powers to compel their operation in a manner which shall protect the public health, welfare, and safety and promote the widest range of beneficial uses of the environment in accordance with the New York Statutes, Environmental Conservation Law §1-0101 et. seq., all of which is to be performed in a manner which conforms to the Water Pollution Control Act, Title 33, U.S.C., §1251 and related regulations and directives.

63. Nevertheless, defendants NYDEC and Reid have knowingly, negligently, and wrongfully violated and continue to violate the New York Statutes, Environmental Conservation Law and the Water Pollution Control Act in the following manner:

(a) The New York Department of Environmental Conservation and Reid have failed to take effective action to prevent, reduce, and eliminate the discharge of pollutants into the Hudson River and into the New York Harbor from outfall structures connected with defendant New York City's sewer system despite the resulting violation of the effluent standards and limits established in accordance with the Water Pollution Control Act.

(b) The New York Department of Environmental Conservation and Reid in their repeated failure to comply with the express requirements of the New York Statutes, Environmental Conservation Laws

and the Federal Water Pollution Control Act have exceeded their authority given in the above statutes.

(c) The New York Department of Environmental Conservation granted and have continue to grant approval of permits allowing for the discharge of pollutants to an extent greater than that allowed by any provisions of the Water Pollution Control Act.

64. On account of such violations by defendants and the ensuing pollution and deterioration of the marine environment, plaintiffs and all within the class as well as the public in general have suffered and continue to suffer vast damages and harm to their health, safety, welfare, property and livelihood, as well as an infringement of their vested rights and in interference with their use of the public trust.

COUNT VI

65. Plaintiff incorporates the allegations of Paragraphs 1 through 64 of the Complaint against defendants and makes the same a part hereof.

66. Defendants, NJDEP and Bardin, are charged with responsibility to promote and plan for environmental conservation and to prevent pollution and ecological disturbance in accordance with Title 13, N.J.S.A., §10-1 et. seq.

67. Nevertheless, defendants NJDEP and Bardin have knowingly, negligently, and wrongfully violated and continue to violate the New Jersey Conservation and Development Law in the following manner:

(a) New Jersey Department of Environmental Protection and Bardin have failed to take effective action to prevent, reduce, and eliminate the discharge of pollutants into the coastal waters adjacent to the Atlantic Ocean and into the Atlantic Ocean itself.

(b) New Jersey Department of Environmental Protection and Bardin have repeatedly failed to comply with the express requirements of the New Jersey Conservation and Development Law and have repeatedly exceeded their authority given in the above statutes.

68. On account of such violations by defendants, plaintiffs and all within the class as well as the public in general have suffered and continue to suffer vast damages and harm to their health, safety, welfare, property and livelihood, as well as an infringement of their vested rights and an interference with their use of the public trust.

Count VII

69. Plaintiff incorporates the allegations made in Paragraphs 1 through 68 of the Complaint against defendants and makes the same a part hereof.

70. The defendants EPT and Train are charged with the responsibility of carrying out the national policy as expressed in the National Environment Policy Act, Title 42, U.S.C., §4321, et seq., which is to encourage productive and enjoyable harmony between man and his environment, to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.

71. Defendants EPA and Train have knowingly, negligently, and wrongfully violated and continue to violate the National Environmental Protection Act in the following manner:

> (a) Despite the continued and increasing discharge of pollutants into the Hudson River, New York Harbor and Atlantic Ocean, defendants have failed to develop, plan, and coordinate federal functions, programs, and resources to the end that the marine environment of the Atlantic Ocean might exist without degradation, and that those who use the marine environment might do so without risk to health or safety or other undesirable and unintended consequences.

72. On account of such violations by defendants and the ensuing pollution deterioration of the marine environment, plaintiffs and all within the class as well as the public in general have suffered and continue to suffer vast damages and harm to their health, safety, welfare, property and livelihood, as well as an infringement of their vested rights and an interference with their use of the public trust.

COUNT VIII

73. Plaintiff incorporates the allegations made in Paragraphs 1 through 72 of the Complaint against the defendants and makes the same a part hereof.

74. Defendants, New York City, Beame, Glen Cove, Long Beach, W. Long Beach, Westchester Co., Bergen Co., Essex Co., Passaic Val., Middlesex Co., Linden Roselle

and Middletown, are charged with the responsibility of carrying out sewage operations in accordance with the provisions and regulations promulgated under the authority of the Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act, and where appropriate in accordance with New York Statutes, Environmental Conservation Law, §1-0101 et seq. or with Title 13 N.J. S.A., §1D-1 et seq., and in addition are charged with the responsibility of carrying out dumping and sewage operations in accordance with the provisions of the permits issued by the EPA, Army Corps or NYDEC.

75. Defendants, New York City, Beame, Glen Cove, Long Beach, W. Long Beach, Westchester Co., Bergen Co., Essex Co., Passaic Val., Middlesex Co., Linden Roselle and Middletown, have in the past and continue to knowingly, negligently, and wrongfully discharge sewage, sludge and other waste materials in a manner which does not comply with the requirements set forth under the authority of the Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act, and under New York Statutes, Environmental Conservation Law, §1-0101 et seq. or Title 13, N.J.S.A., §1D-1 et seq., and in addition, which does not comply with the requirements of the issued permits.

76. On account of such violations by defendants and the ensuing pollution and deterioration of the marine environment, plaintiffs and all within the class as well as the public in general have suffered and continue to suffer vast damages and harm to their health, safety, welfare, property and livelihood, as well as an infringement on their vested rights and an interference with their use of the public trust.

COUNT IX

77. Plaintiff incorporates the allegations of Paragraphs 1 through 76 of the Complaint against defendants and makes the same a part hereof.

78. Defendants EPA, Train, Army Corps, Hoffman, and the agents of such defendants are charged with the responsibility and duty of carrying out the determinations of officials exercising discretionary functions in accordance with the Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act and the National Environmental Policy Act.

79. Defendants EPA, Train, Army Corps, Hoffman, and the agents of such defendants have carried out such duties as regards the issuance of permits, establishment of dumping sites, monitoring of dumping activity, supervision of the development of alternative plans of sewage disposal by permittees, and supervision of the entire disposal operations in a negligent, careless, and wrongful manner, and have failed to exercise due care when defendants and their agents knew or should have known that such actions would create the hazards and dangers complained of in Count I.

80. Defendant Army Corps and its agents have the responsibility and duty of carrying out the dredging operations in a safe manner in accordance with regulations and with reasonable precautions.

81. Defendant Army Corps and its agents have carried out such operations in a negligent, careless, and wrongful manner and have failed to exercise due care when defendant and its agents knew or should have known that such

actions would create the hazards and dangers complained of in Count I.

82. Such failure to exercise due care in carrying out the duties described in Paragraphs 78 to 81 above has resulted in the harm and damage to plaintiffs and the general public as described in Count I and therefore liability may be imposed under Title 28, U.S.C., §1346(b) and Title 28, U.S.C. §2671 et. seq.

COUNT X

83. Plaintiff incorporates the allegations of Paragraphs 1 through 82 of the Complaint against the defendants and makes the same a part hereof.

84. Amendments 5, 9, and 14, to the Constitution of the United States protect the public rights in the natural resource which is the Atlantic Ocean which is a trust for the use and enjoyment of all people at this time and for the future.

85. Defendants New York City, Beame, Glen Cove, Long Beach, W. Long Beach, Westchester Co., Bergen Co., Essex Co., Passaic Val., Middlesex Co., Linden Roselle, Middletown, and Army Corps by their actions described in Count I have caused unreasonable degradation of the marine environment of the Atlantic Ocean and have thereby infringed the rights of the people, and more particularly the rights of plaintiffs by preventing the use and enjoyment of the public trust.

86. Defendants EPA, Train, Army Corps, Hoffmann, NYDEC, Reid, NJDEP, and Bardin have, by their failure

to act and take appropriate measures, encouraged further degradation of the ocean environment and thereby have infringed the rights of the people and more particularly the rights of plaintiffs by preventing the use and enjoyment of the public trust.

COUNT XI

87. Plaintiff incorporates the allegations in Paragraphs 1 through 86 of the Complaint against the defendants and makes the same a part hereof.

88. Amendment 5 of the Constitution of the United States provides that private property shall not be taken for public use without just compensation.

89. Defendants New York City, Beame, Glen Cove, Long Beach, W. Long Beach, Westchester Co., Bergen Co., Essex Co., Passaic Val., Middlesex Co., Linden Roselle Middletown, and the Army Corps by their actions described in Count I have taken and destroyed property held in trust for the public benefit and more particularly for plaintiffs' use and enjoyment without providing compensation of any kind.

COUNT XII

90. Plaintiffs incorporate the allegations of Paragraphs 1 through 89 of the Complaint against defendants and make the same the subject matter of a pendent cause of action for common law nuisance.

COUNT XIII

91. Plaintiffs incorporate the allegations of Paragraphs 1 through 90 of the Complaint against defendant and make the same a part hereof.

92. Defendants New York City, Beame, Glen Cove, Long Beach, W. Long Beach, Westchester Co., Bergen Co., Essex Co., Passaic Val., Middlesex Co., Linden Roselle, Middletown, and the Army Corps, by their knowing and negligent actions as described in Count I, have continuously caused physical harm and damage to the property of the public trust which is the waters of the Atlantic Ocean and to the property of the plaintiffs in particular which is clam beds, lobster beds and fishing grounds and marine life therein which is for the use and enjoyment of plaintiffs.

93. Such trespass and harm and damage to the property of the public and of the plaintiffs and all within the class presents a pendent cause of action in trespass.

WHEREFORE, plaintiffs pray:

94. That defendants, City of New York, Beame, Glen Cove, Long Beach, W. Long Beach, Westchester Co., Bergen Co., Essex Co., Passaic Val., Middlesex Co., Linden Roselle, Middletown, and Army Corps be enjoined and restrained from dumping sewage, sludge or other pollutants off the coast of the continental United States until a full hearing on the merits of this suit is had.

95. For actual damages in the amount of $250,000,000.00 and punitive damages in the amount of $250,000,000.00, assessed against defendants jointly and severally.

96. For judgment that defendants, EPA, Train, Army Corps and Hoffmann, Secretary of the Army are bound to comply with the requirements of the Water Pollution Control Act, Marine Protection, Research, and Sanctuaries Act, and National Environmental Policy Act in the establishment and enforcement of standards and programs and in the issuance of permits and that such defendants knowing of such requirements have nevertheless failed to comply therewith.

97. For judgment that defendants, NYDEC, Reid, NJ DEP and Bardin are bound to comply with the requirements of the New York Statutes, Environment Conservation Law §1-0101 et. seq. and the New Jersey Conservation and Development Law, Title 13, N.J.S.A., §1D-1 respectively and that defendants are bound to comply with the Federal Water Pollution Control Act and in the establishment and enforcement of standards and programs and in the issuance of permits and that such defendants knowing of such requirements have nevertheless failed to comply therewith.

98. That defendants, City of New York, Beame, Glen Cove, Long Beach, W. Long Beach, Westchester Co., Bergen Co., Essex Co., Passaic Val., Middlesex Co., Linden Roselle, Middletown, and Army Corps be fined $50,000.00 for each dumping, from each of several vessels, and for each day on which such dumpings occurred, which was not in compliance with the ocean dumping permits issued by the Administrator of the Environmental Protection Agency and the Secretary of the Army, as provided by 33 U.S.C., §1415(a) and (c), said fines to be paid to the named plaintiffs and the class.

99. That after trial, defendants, City of New York, Beame, Glen Cove, Long Beach, W. Long Beach, Westchester Co., Bergen Co., Essex Co., Passaic Val., Middlesex Co., Linden Roselle, Middletown, and Army Corps, be enjoined and restrained from dumping raw sewage or other pollutants into the ocean within 100 miles of the coast of New Jersey until July 31, 1977 at which time the permits expire and at such time, defendants, City of New York and Army Corp of Engineers, be permanently enjoined and restrained from dumping any sewage or other pollutants off the coast of the continental United States.

100. That defendants, City of New York and Beame, Glen Cove, Long Beach, W. Long Beach, Westchester Co., Bergen Co., Essex Co., Passaic Val., Middlesex Co., Linden Roselle, and Middletown, be permanently enjoined and restrained from dumping and discharging sewage, sludge, and other wastes into New York Harbor and the Hudson River.

101. For Writ of Mandamus ordering the defendants EPA, Train, Army Corps, and Hoffmann, to revoke any and all permits issued to the City of New York, Beame, Glen Cove, Long Beach, W. Long Beach, Westchester Co., Bergen Co., Essex Co., Passaic Val., Middlesex Co., Linden Roselle, Middletown, and Army Corps which allows dumping or discharging sewage, sludge, and other wastes into New York Harbor, Hudson River, and the Atlantic Ocean.

102. That defendants, City of New York, Beame, Glen Cove, Long Beach, W. Long Beach, Westchester Co., Bergen Co., Essex Co., Passaic Val., Middlesex Co., Linden Roselle, Middletown, and Army Corps be permanently en-

joined from dumping sewage and sludge in ocean areas within 100 miles of the New Jersey coast.

103. For judgment that defendants, City of New York, Beame, Glen Cove, Long Beach, W. Long Beach, Westchester Co., Bergen Co., Essex Co., Passaic Val., Middlesex Co., Linden Roselle, Middletown, EPA, Train, Army Corps, Hoffmann, NYDEC, Reid, NJDEP, and Bardin, have caused a continuing nuisance to be committed upon the lands and waters of New Jersey used for pleasure, relaxation, and the business of named plaintiffs and the class, and ordering the defendants, and each of them, to cease and desist from such nuisance, and abate the same by not dumping sewage within 100 miles of the New Jersey coastline, and order the defendants to compensate the plaintiff in the amount of $250,000,000.00 for the injury and damage occasioned by the nuisance.

104. That defendants, City of New York, Beame, Glen Cove, Long Beach, W. Long Beach, Westchester Co., Bergen Co., Essex Co., Passaic Val., Middlesex Co., Linden Roselle, Middletown, EPA, Train, Army Corps, Hoffmann, NYDEC, Reid, NJDEP, and Bardin, bear all costs necessary to correct the damage caused by their conduct.

105. For judgment that defendants, City of New York, Beame, Glen Cove, Long Beach, W. Long Beach, Westchester Co., Bergen Co., Essex Co., Passaic Val., Middlesex Co., Linden Roselle, Middletown, and Army Corps, are bound to observe the standards set in the ocean dumping permits issued to them by the EPA and/or Secretary of the Army, and that defendants, mentioned above, knowing of such standards have nevertheless failed to comply therewith.

106. For costs of suit, including reasonable attorneys' and expert witnesses' fees, as provided by 33 U.S.C. §1365(d) and §1415(g)(4).

107. That defendants New York City, Beame, Army Corps, Bergen Co., Essex Co., Passaic Val., Middlesex Co., Linden Roselle, Middletown, Glen Cove, Long Beach, W. Long Beach, and Westchester Co. be fined for each violation of the Rivers and Harbors Act of 1899 as set out in Count II in accordance with the provisions of such Act, Title 33, U.S.C., §411.

108. That plaintiffs be granted one half of the fines assessed against defendants in accordance with the prayer in Paragraph 108 and in accordance with the provisions of the Rivers and Harbors Act of 1899, Title 33, U.S.C., §411.

109. For such other and further relief as the Court deems proper.

Respectfully submitted,

LaBrum and Doak
By Edward C. German
By Joseph G. Manta

Shackleton, Hazeltine and Zlotkin
By Richard J. Shackleton

Of counsel:

LaBrum and Doak
1500 Seven Penn Center Plaza
Philadelphia, Pa. 19103
(215) 561-4400

Of counsel:

Shackleton, Hazeltine and Zlotkin
22nd Street and Long Beach Boulevard
Ship Bottom, N.J. 08008
(609) 494-2136

Note Concerning Opinion and Judgment of Court of Appeals and Opinion and Order of District Court

The opinion and the judgment of the Court of Appeals appear in the appendix to the petition for certiorari of Middlesex County Sewerage Authority et al. at pp. 1a and 38a, respectively; and in the appendix to the petition for certiorari of Environmental Protection Agency et al. at pp. 1a and 32a, respectively.

The opinion and order of the District Court appear in the appendix to the petition for certiorari of Middlesex County Sewerage Authority et al. at pp. 40a and 68a respectively; and in the appendix to the petition for certiorari of Environmental Protection Agency et al. at pp. 35a and 60a, respectively.

Order Granting Writs

(Entered October 20, 1980)

CERTIORARI GRANTED

79-1711) MIDDLESEX CO. SEWERAGE v. NATL. SEA CLAMMERS ASSN.

79-1754) JOINT MEETING ESSEX & UNION v. NATL. SEA CLAMMERS ASSN.

79-1760) NEW YORK, ET AL. v. NATL. SEA CLAMMERS ASSN.

80-12) EPA, ET AL. v. NATL. SEA CLAMMERS ASSN.

The petitions for writs of certiorari are granted limited to the following questions:

1. Whether the Federal Water Pollution Control Act, 33 U.S.C. (& Supp. I) §§ 1251 *et seq.*, and the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. (& Supp. I) §§ 1401 *et seq.*, imply a private right of action independent of the rights explicitly created by the citizens suit provisions of those Acts, 33 U.S.C. §1415 (g).

2. Whether a private citizen has standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution as a general federal question under 28 U.S.C. §1331.

3. Whether any federal common law nuisance action for alleged damages sustained resulting from ocean pollution, if available to a private citizen, is not preempted by the present regulatory scheme governing ocean pollution established by the Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act.

The cases are consolidated and a total of one hour is allotted for oral argument.

Nos. 79-1711, 79-1760, 79-1754 and 80-12

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1711

MIDDLESEX COUNTY SEWERAGE AUTHORITY, *et al.*,
Petitioners

v.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*,
Respondents

(And three other Petitions listed verso.)

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CONSOLIDATED BRIEF OF RESPONDENTS, NATIONAL SEA CLAMMERS ASSOCIATION AND GOSTA LOVGREN, IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

Robert P. Corbin
Philip A. Ryan
Edward C. German
Dean F. Murtagh
Counsel for Respondents,
National Sea Clammers Association and Gosta Lovgren

GERMAN, GALLAGHER & MURTAGH
700 IVB Building
1700 Market Street
Philadelphia, PA 19103
(215) 561-4400
Of Counsel.

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4050

Other Petitions to which this Brief replies are as follows:

No. 79-1760

City of New York, et al.,
Petitioners

v.

National Sea Clammers Association, et al.,
Respondents

No. 79-1754

The Joint Meeting of Union and Essex Counties,
Petitioner

v.

National Sea Clammers Association, et al.,
Respondents

No. 80-12

Environmental Protection Agency, et al.,
Petitioners

v.

National Sea Clammers Association, et al.,
Respondents

TABLE OF CONTENTS

	Page
Introduction	3
Jurisdiction	3
Counterstatement of Questions Presented	4
Counterstatement of the Case	5
Argument — Reasons for denying the writ:	
A. The holding of the Court of Appeals that the failure of plaintiffs strictly to comply with the notice provisions of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1251 et seq., and the Marine Protection, Research, and Sanctuaries Act (MPRSA), 33 U.S.C. §1401 et seq., did not deprive the District Court of jurisdiction to entertain plaintiffs' claims to enforce the provisions of those Acts is correct, and is supported by the more weighty and better reasoned authorities	8
1. The decision of the Court of Appeals is also supported by alternative grounds which the Court did not pass upon	10
B. The Court of Appeals correctly held that the federal common law of nuisance has not been preempted by federal statutes	12
1. In the alternative, this Court has already granted certiorari to review the decision of the Seventh Circuit in *Illinois v. City of Milwaukee*, 599 F.2d 151. Since that case also involves the issue of preemption of the federal common law of nuisance, review of the instant case is unnecessary	14

TABLE OF CONTENTS *(Continued)*

Page

C. The holding of the Court of Appeals that private parties have standing to recover damages based upon a common law of nuisance claim is supported by the more weighty and better reasoned authorities 14

1. Standing of Private Parties 14
2. Monetary Damages Under the Federal Common Law of Nuisance 17

D. The holding of the Court of Appeals that state sewerage authorities are municipal corporations to whom sovereign immunity under the Eleventh Amendment does not apply is consistent with the decisions of this Court 19

E. The holding of the Court of Appeals that state tort claims acts may not preempt federal statutory or common law causes of action is mandated by the Supremacy Clause of the United States Constitution 22

F. Although the decision of the Court of Appeals concerning the existence of a private cause of action to enforce the terms of FWPCA and MPRSA conflicts with the decision of the Seventh Circuit in *City of Evansville v. Kentucky Liquid Recycling Corp.*, 604 F.2d 1008, it would not be appropriate for this Court to resolve this conflict by reviewing the present case because of the alternative causes of action available to plaintiffs under the federal common law of nuisance and maritime tort claims 23

Conclusion 24

TABLE OF CITATIONS

Cases Cited: Page

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) 18, 19

Burges v. M/V Tamano, 370 F. Supp. 247 (D.Me. 1973) 18

Byram River v. Village of Port Chester, 394 F. Supp. 618 (S.D.N.Y. 1975) 16

City of Evansville, Indiana v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979), cert. denied, 100 S. Ct. 689 (1980) 16, 23

City of Hyland Park v. Train, 519 F.2d 681 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976) 10n

Committee for Con. of Jones Falls Sewage System v. Train, 375 F. Supp. 1148 (D. Md. 1974), affirmed on other grounds, 539 F.2d 1006 (4th Cir. 1976) 12, 16, 17

Conservation Society of S. Vt., Inc. v. Secretary of Transportation, 508 F.2d 927 (2d Cir. 1974), vacated, 423 U.S. 809 (1975) 9n, 10n

Friends of the Earth v. Carey, 535 F.2d 165 (2d Cir. 1976) 11

Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) 15n

Gibbons v. Ogden, 9 Wheat. (22 U.S.) 1, 210-211 (1824) 22

Hines v. Davidowitz, 312 U.S. 52, (1941) 22

Illinois v. City of Milwaukee, 599 F.2d 151 (7th Cir. 1979), cert. granted, 48 U.S.L.W. 3902 (March 18, 1980) 13-15, 17, 19

Lafayette v. Louisiana Power and Light Co., 435 U.S. 389, (1978) 20

TABLE OF CITATIONS *(Continued)*

Cases Cited: Page

Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, (1979) 20

Lee v. Florida, 392 U.S. 378 (1968) 22

Lincoln County v. Luning, 133 U.S. 529 (1890) . 20

Monell v. N.Y.C. Department of Public Service, 436 U.S. 658, (1978) 20

Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, (1977) 20, 21

Natural Resources Defense Council, Inc. v. Callaway, 524 F.2d 79 (2d Cir. 1975) ... 9n, 10n

Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692 (D.C. Cir. 1974) 9n, 10n

Parsell v. Shell Oil Co., 421 F. Supp. 1275 (D.Conn. 1976) aff'd. without opinion sub nom. East End Yacht Club, Inc. v. Shell Oil Co. 573 F.2d 1289 (2d Cir. 1977) 16-17

Perez v. Campbell, 402 U.S. 637 (1971) 22

Reserve Mining Co. v. Environmental Protection Agency, 514 F.2d 492, (8th Cir. 1975) 17

Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971) . 15n

Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) 18

Township of Long Beach v. City of New York, 445 F. Supp. 1203, (D.N.J. 1978) 16

United States v. Ira S. Bushey & Sons, 346 F. Supp. 145 (D.Vt. 1972), aff'd 487 F.2d 1303 (2d Cir. 1973), cert. denied, 417 U.S. 976 (1974) 16

United States v. Stoeco Homes, 498 F.2d 597 (3d Cir. 1974) cert. denied, 420 U.S. 927 (1975) . 16

TABLE OF CITATIONS *(Continued)*

United States Constitution Cited: Page

Article VI, Clause 2 22

Fifth Amendment 6

Ninth Amendment 6

Eleventh Amendment 6, 19-20

Fourteenth Amendment 6

Statutes Cited:

N.J.S.A. 13:10-1 6

N.J.S.A. 40:14A-7 21

N.J.S.A. 59:1-1 (New Jersey Tort Claims Act) ..21, 22

N.J.S.A. 59:1-3 21

N.J.S.A. 59:8-8 22

N. Y. Environ. Conserv. 1:0101 6

28 U.S.C.:

Sec. 1254(1) 3

Sec. 1331 9

Sec. 1331(a) 15

33 U.S.C. (Federal Water Pollution Control Act, as amended):

Sec. 1251-1376 8

Sec. 1365(e) 13

33 U.S.C. (Marine Protection, Research, and Sanctuaries Act of 1972, as amended):

Sec. 1401-1444 ..... 6, 8

Sec. 1415(g)(5) 13

TABLE OF CITATIONS *(Continued)*

Statutes Cited: Page

33 U.S.C. (Rivers and Harbors Act of 1899, as amended):
Sec. 407 6

42 U.S.C. (National Environmental Policy Act of 1969, as amended):
Sec. 4321-4361 6

Other Authorities Cited:

Restatement (Second) of Torts:
Sec. 821C 18

W. Rodgers, Environmental Law:
Sec. 1.13 (1977) 11

S. Rep. No. 414, 92d Cong., 1st Sess., Reported in 1972, U.S. Code Cong. & Ad. News 3668, 3674, 3747-47 8,13

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 79-1711

Middlesex County Sewerage Authority, Passaic Valley Sewerage Commissioners, Middletown Sewerage Authority, Bergen County Sewer Authority, and The Linden Roselle Sewerage Authority,

Petitioners

v.

National Sea Clammers Association and Gosta Lovgren,
Respondents

No. 79-1760

City of New York, Honorable Abraham Beame,
Petitioners

v.

National Sea Clammers Association and Gosta Lovgren,
Respondents

No. 79-1754

The Joint Meeting of Union and Essex Counties,
Petitioner

v.

National Sea Clammers Association and Gosta Lovgren,
Respondents

No. 80-12

Environmental Protection Agency, Russell E. Train, Individually and as Administrator of the United States Environmental Protection Agency, United States Army Corps of Engineers, and Martin R. Hoffman, Individually and as Secretary of the United States Department of the Army,

Petitioners

v.

National Sea Clammers Association and Gosta Lovgren,
Respondents[1]

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CONSOLIDATED BRIEF OF RESPONDENTS, NATIONAL SEA CLAMMERS ASSOCIATION AND GOSTA LOVGREN, IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

1. The following were also parties to the proceedings below, but have not participated in the instant petitions: New York Department of Environmental Conservation, Ogden R. Reid, individually and as Commissioner of the New York Department of Environmental Conservation, New Jersey Department of Environmental Protection, David J. Bardin, individually and as Commissioner of New Jersey Department of Environmental Protection, West Long Beach Sewer District, County of Westchester, Department of Environmental Facilities, City of Long Beach and City of Glen Cove.

INTRODUCTION

Four petitions for a writ of certiorari have been filed following the entry of an opinion and judgment by the United States Court of Appeals for the Third Circuit on February 5, 1980. (App. p. 1a *et seq.*, and pp. 37a-39a.)[2] Although no two petitions raise precisely the same issues, there are several issues and arguments which are common to more than one petition. Thus, in the interests of efficiency and clarity, we have prepared a single, consolidated response to these petitions.

JURISDICTION

The jurisdiction of this Court has been invoked under 28 U.S.C. §1254(1).

2. Appendix references are to the appendix accompanying the initial Petition for a Writ of Certiorari filed on behalf of Middlesex County Sewerage Authority, *et al.*, on April 29, 1980, No. 79-1711.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Third Circuit properly hold that the District Court had jurisdiction under the Federal Water Pollution Control Act (FWPCA) and Marine Protection, Research, and Sanctuaries Act (MPRSA) to entertain plaintiffs' claims that defendants violated their duties under those Acts, even though plaintiffs did not strictly comply with certain notice provisions contained in the Acts?

2. Are the sixty-day notice provisions in FWPCA and MPRSA satisfied by the giving of notice sixty days prior to any judicial action on the suit or claim?

3. Did the Third Circuit properly hold that the federal common law of nuisance has not been preempted by federal statutes, and that private plaintiffs have a cause of action under the federal common law of nuisance for money damages?

4. Did the Third Circuit properly hold that state sewerage authorities are municipal corporations to whom sovereign immunity under the Eleventh Amendment does not apply?

5. Did the Third Circuit properly hold that state tort claims acts may not preempt federal statutes or common law causes of action?

6. Did the Third Circuit properly hold that plaintiffs have a cause of action independent of the remedies expressly provided for by FWPCA and MPRSA, on which plaintiffs may bring suit pursuant to the savings clauses in those statutes?

COUNTERSTATEMENT OF THE CASE

Respondents in this litigation are the National Sea Clammers Association, an association whose members earn their livelihood through the harvesting of fish, lobster, and other shellfish from the ocean and ocean beds of the Atlantic Ocean, adjacent to the states of New York and New Jersey, and Gosta Lovgren, an individual similarly employed. The petitioners and certain other respondents[3] include various federal, state, and local officials, as well as governmental departments, involved with environmental protection or sewage treatment and disposal.

On January 14, 1977, respondents, National Sea Clammers Association and Gosta Lovgren, brought suit on behalf of themselves and all others similarly situated in the United States District Court for the District of New Jersey. The respondents' complaint alleged that defendants either discharged or permitted the discharge of various nutrient-rich sewage and other toxic substances and wastes into the Atlantic Ocean or its tributaries. During the summer of 1976, these discharges caused a massive and rapid growth of algae ranging in an area from Long Island to Cape May, New Jersey, and extending from a few miles offshore to approximately twenty miles offshore. When this massive algal bloom died, its residuals settled on the ocean floor, creating a condition of anoxia, or oxygen deficiency, in and about the water near the ocean's floor. This condition resulted in the death and destruction of an enormous amount of marine life, particularly with respect to the shellfish and other ocean-bottom dwellers and other marine life unable to escape the blighted area. As a result, the commercial

---

3. The parties who were named as defendants in the action below, but who have not filed petitions on their own behalf are identified in footnote one, *supra*. Hereinafter "respondents" will be used only to refer to the National Sea Clammers Association and Gosta Lovgren.

fishing, clamming and related industries, in which respondents earned their livelihood, were virtually destroyed.

In their complaint, respondents alleged violations of the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4361 (1976), the Federal Water Pollution Control Act, 33 U.S.C. §§1251-1376 (1976 and Supp. I), the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. §§1401-1444 (1976), the Rivers and Harbors Act of 1899, 33 U.S.C. §407 (1976), the New York Environmental Conservation Law, N.Y. Environ. Conserv. §1-0101 (McKinney 1973), the New Jersey Conservation and Development Law, N.J.S.A. 13: 10-1 (1968), the federal common law of nuisance, and the Fifth, Ninth and Fourteenth Amendments to the Constitution. The complaint sought injunctive relief, damages, mandamus to compel compliance with statutory duties, the impositions of fines and penalties for certain of the violations alleged, the award to plaintiffs of one-half of the fines assessed, and the reasonable expenses of the litigation, including expert witness and attorneys' fees.

Each of the defendants below moved for dismissal of all claims on the grounds that the District Court lacked subject matter jurisdiction over the action, or that the respondents had failed to state a claim upon which relief could be granted. Treating these motions as motions for summary judgment, the District Court granted said motions as to each cause of action alleged. The District Court dismissed the complaint, with prejudice, as to all claims except for two which arose under state law, which were dismissed without prejudice.

On appeal, the Third Circuit reversed the judgment of the District Court to the extent that the District Court judgment dismissed respondents' claims under the Federal Water Pollution Control Act, the Marine Protection, Research, and Sanctuaries Act, and respondents' common law nuisance and maritime tort claims. The Third

Circuit affirmed the District Court's dismissal of respondents' Refuse Act claim, Federal Tort Claims Act and state tort claims, and the constitutional claims. With respect to the District Court's dismissal of the National Environmental Policy Act claim, the Third Circuit vacated the District Court's order with direction that this claim be remanded for consideration of the record developed on remand.

ARGUMENT

A. The holding of the Court of Appeals that the failure of plaintiffs strictly to comply with the notice provisions of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1251 et seq., and the Marine Protection, Research, and Sanctuaries Act (MPRSA), 33 U.S.C. §1401 et seq., did not deprive the District Court of jurisdiction to hear plaintiffs' claims to enforce the provisions of those Acts is correct, and is supported by the more weighty and better reasoned authorities.

Each of the petitioners has sought review of that portion of the Court of Appeals' decision holding that plaintiffs are entitled to prosecute their claims under the FWPCA and MPRSA despite the failure to comply with the notice provisions contained in those statutes. Although recognizing that a conflict exists among the circuits with respect to this issue, respondents submit that the better reasoned decisions of other Courts of Appeal support the decision here under review.

The adoption of FWPCA in 1972 signified Congressional recognition that " . . . the restoration of the natural, chemical, physical and biological integrity of the nation's water is essential", and that the prior " . . . national effort to abate and control water pollution has been inadequate in every vital aspect". S. Rep. No. 414, 92d Cong., 1st Sess., reported in 1972, U.S. Code Cong. & Ad. News 3668, 3674. The resulting legislation evidences the Congressional intent that citizen participation be expanded in the enforcement of legislation aimed at the improvement of our environment. The Court of Appeals carefully reviewed the legislative history surrounding the enactment of FWPCA and correctly concluded that this legislation was intended " . . . to provide generally for citizens' suits which would not be subject to the jurisdictional amount requirement and yet would provide for private attorney general enforcement to the

maximum degree permitted by the Court's *Sierra Club* decision." (App. pp. 8a-9a.)

Consistent with the legislative intent to expand the role of citizen participation in the enforcement of a clean environment, the FWPCA and MPRSA[4] not only created specific statutory authority for the initiation of environmental litigation by private parties, but also sought to preserve all rights and remedies which existed under all other law. Thus, both the FWPCA and MPRSA contain savings clauses specifically preserving rights and remedies " . . . under any statute or common law . . . . " As the Court of Appeals correctly held, and as the Courts of Appeal for the Second and District of Columbia Circuits had previously held[5], the remedies expressly provided for in these statutes are not the exclusive methods of enforcement of the statutes. Rather, the notice provisions in each statute only apply when a non-injured member of the public chooses to enforce the provisions of the Acts. Private parties injured by the alleged violation, such as respondents, have an alternate basis for suit under the Acts pursuant to the savings clauses and the general federal question jurisdiction of the District Court. 28 U.S.C. §1331 (1976). As the Third Circuit correctly explained:

> Section 505(e) is a savings clause that preserves all rights to enforce the Act or seek relief against the administrator. Coupled with the general federal question jurisdiction it permits this suit to be brought by these parties. Moreover, unlike the private attorneys general provision of Section 505(a),

---

4. The relevant statutory provisions and legislative histories of these two Acts are virtually indistinguishable. Thus, no separate analysis of MPRSA is required.

5. *Natural Resources Defense Council, Inc. v. Train* 510 F.2d 692 (D.C. Cir. 1974); *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79 (2d Cir. 1975); *Conservation Society of S. Vt., Inc. v. Secretary of Transportation*, 508 F.2d 927 (2d Cir. 1974), vacated, 423 U.S. 809 (1975).

> Section 505(e) provides an independent remedy for injured parties unburdened by the notice requirements of Section 505(b).

(App. p. 10a)

As the Third Circuit itself noted, and as respondents concede, a conflict does exist among the lower courts on the issue of whether the savings clauses of FWPCA and MPRSA authorize private enforcement of the Acts as an alternative to that authorized by the express provisions of these Acts.[6] However, respondents submit that the more weighty and more persuasively reasoned cases support the position that the savings clauses of these statutes were intended to preserve the rights of injured members of the public, such as respondents herein, to bring suit to enforce the terms of the Acts, despite the expansion of remedies made available to non-injured parties by the express provisions of the statute.

1. *The decision of the Court of Appeals is also supported by alternative grounds which the Court did not pass upon.*

In addition to their arguments as noted above, respondents also submit that it is unnecessary for this Court to grant the petitions with respect to the issue of the notice provisions of the FWPCA and MPRSA inasmuch as the decision of the Court of Appeals is amply supported by an alternative ground which the Court did not rule upon.

---

6. Only the Seventh Circuit *City of Hyland Park v. Train*, 519 F.2d 681, cert. denied, 424 U.S. 927, has reached a conclusion contrary to the views of the Second, Third, and District of Columbia Circuits, which were expressed in the instant case and in *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1974); *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79 (2d Cir. 1975); *Conservation Society of St. Vt., Inc. v. Secretary of Transportation*, 508 F. 2d 927 (2d Cir. 1974), vacated 423 U.S. 809 (1975).

The notice provisions of these Acts " . . . are intended to afford the agency an opportunity to do the job, not to frustrate citizen action with procedural trickery . . . " W. Rodgers, *Environmental Law*, §1.13 (1977). Thus, the notice provisions are to be construed "flexibly and realistically", consistent with this purpose. *Friends of the Earth v. Carey*, 535 F.2d 165, 175 (2d Cir. 1976). Such a flexible and pragmatic approach to interpreting the notice provisions of the Acts would merely require that sixty days elapse prior to District Court action on the complaint. Because of its analysis of the independent significance of the savings clauses, the Third Circuit did not pass upon this alternative interpretation. However, the court did indicate that it was favorably disposed to this view.[7] Respondents submit that this alternative is consistent with the fundamental purposes of the environmental legislation, including participation by the citizens in the enforcement of environmental legislation to the maximum extent possible.

In addition, it should be noted that compliance with the notice requirements of the FWPCA and MPRSA by respondents would have constituted a futile act in the present case. As has been previously noted, the damages about which respondents complaint had been incurred prior to the commencement of this litigation. Even if, as petitioners submit, the notice provisions of the statutes are designed to afford the alleged violator with the opportunity to remedy the alleged violation prior to the institution of suit, such legislative purpose would not have been advanced by the giving of notice in this case. Therefore, under the particular circumstances in this case, respondents were not required to comply with the notice provisions of the FWPCA and MPRSA.

---

7. The Court of Appeals in discussing this issue stated, "We note, however, that it would be entirely permissible for this court to adopt the pragmatic approach to interpreting the 60-day notice provision by which we would merely require that sixty days elapse prior to District Court action on the complaint." (App. p. 5a-6a.)

B. The Court of Appeals correctly held that the federal common law of nuisance has not been preempted by federal statutes.

In their complaint, respondents alleged a cause of action and sought relief pursuant to the federal common law of nuisance. The District Court dismissed this count of respondents' complaint, but the Third Circuit reversed, holding, inter alia, that the 1972 amendments of the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act, as amended in 1977, had not preempted the federal common law of nuisance. Only petitioners in No. 79-1711, Middlesex County Sewerage Authority, et al., have questioned this aspect of the decision of the Third Circuit in their petition for a writ of certiorari.

In support of their argument that the federal common law of nuisance has been preempted by the enactment of FWPCA and MPRSA, petitioners in No. 79-1711 have placed their sole reliance on the decision in *Committee for Con. of Jones Falls Sewage System v. Train*, 539 F.2d 1006 (4th Cir. 1976). Petitioners' reliance on this decision is misplaced since the Fourth Circuit's discussion of the federal common law of nuisance in that case is dicta. Unlike the instant litigation, the alleged pollution in the *Jones Falls* case did not involve any allegations of interstate pollution. Indeed, the majority opinion noted:

> In controversies such as this one, there is present neither the reason nor the necessity for the invocation of a body of federal common law which was present in *Illinois v. Milwaukee*. This intrastate controversy is entirely local. The plaintiffs are Maryland citizens complaining of the conduct of public officials of the City and County of Baltimore, Maryland. 539 F.2d at 1009.

Unlike the harm alleged in *Jones Falls*, respondents in this litigation have alleged pollution in an important

public waterway and with significant interstate consequences. Accordingly, it is submitted that any discussion by the Fourth Circuit in the *Jones Falls* decision concerning the federal common law of nuisance was not necessary to the court's disposition of that case.

In any event, respondents submit that the legislative history of the environmental statutes involved in this litigation evidences a clear legislative intent that the federal common law of nuisance, as originally articulated by this Court in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), was not to be preempted. Moreover, the language of the statutes themselves clearly indicates that no preemption was intended. Both the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act contain savings clauses specifically preserving a party's rights under " . . . any statute *or common law* . . . " 33 U.S.C. §1365(e); 33 U.S.C. §1415(g)(5). With regard to the scope of the savings clause in the Federal Water Pollution Control Act amendments of 1972, the Senate Report provides:

> It should be noted . . . that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. *Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.* (Emphasis supplied.) S. Rep. No. 414, 92d Cong., 1st Sess. reported in 1972, U.S. Code Cong. & Ad. News 3668, 3746-47.

This legislative history plainly indicates that Congress did not intend the federal environmental statutes to preempt the developing case law in the area of the federal common law of nuisance.

1. In the alternative, this Court has already granted certiorari to review the decision of the Seventh Circuit in Illinois v. City of Milwaukee, *599 F.2d 151. Since that case also involves the issue of preemption of the federal common law of nuisance, review of the instant case is unnecessary.*

Alternatively, respondents submit that it is unnecessary for this Court to grant certiorari on this issue in view of this Court's earlier decision to grant certiorari in *Illinois v. City of Milwaukee*, 599 F.2d 151 (7th Cir. 1979), cert. granted, 48 U.S.L.W. 3902 (March 18, 1980). Since the *Illinois* case also involves the issue of preemption of the federal common law of nuisance, respondents submit that the instant petitions for certiorari on this issue should, for this reason alone, be denied.

Respondents respectfully submit that the Seventh Circuit's decision in *Illinois v. City of Milwaukee* reflects a careful analysis of the effect of federal statutes on the federal common law of nuisance, and that the Seventh Circuit's decision in that regard should be affirmed by this Court.

C. The holding of the Court of Appeals that private parties have standing to recover damages based upon a common law of nuisance claim is supported by the more weighty and better-reasoned authorities.

1. Standing of Private Parties.

Petitioners in 79-1711 (Middlesex County Sewerage Authority, et al.), 79-1760 (City of New York, et al.,), and 79-1754 (The Joint Meeting of Union and Essex Counties) have asserted that respondents, as private parties, lack standing to bring an action under the federal common law of nuisance. It is their contention that this Court's decision in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), evidences an intent to limit standing under the federal common law of nuisance to states. However, such a reading of the *Illinois* decision is overly re-

strictive and ignores the broader holding of that case. While it is true that the plaintiff in *Illinois* was a state, and that the two cases chiefly relied upon by the Court involved actions brought by states,[8] the broader holding of that decision is that, "pollution of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of §1331(a)." 406 U.S. at 99. The *Illinois* Court further explained that, "Our decisions concerning interstate waters contain the same theme. Rights in interstate streams, like questions of boundaries, 'have been recognized as presenting federal questions.' " *Id.* at 105.

Thus, it was not the character of the plaintiff as a state which motivated this Court to apply the federal common law of nuisance in the *Illinois* case, but rather it was the subject matter of the dispute (a navigable waterway of the United States) and the need for a uniform rule of law to govern this dispute. This was confirmed by the Court when it noted that, "it is not only the character of the parties that requires us to apply federal law . . . . where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law." *Id.* at 105, n. 6.

The need for the application of a federal rule of decision is abundantly clear in the present case. The navigable waterway which is involved here is the Atlantic Ocean, and the interests sought to be protected are ones which affect the entire New Jersey coastal region. The Court of Appeals quite correctly observed that, "Relegating these litigants to possibly conflicting New York and New Jersey nuisance standards would ignore the clear intent of the Supreme Court to federalize those standards and would undermine that federal uniformity. These plaintiffs have sufficiently alleged pollution of in-

---

8. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971).

terstate waters. In order to give full effect to the federal common law of nuisance recognized in *Illinois*, private parties should be permitted, and indeed encouraged, to participate in the abatement of such nuisances." (App. pp. 25a-26a).

Other courts have recognized that the *Illinois* decision should not be restricted to its particular facts. Both the Second and Third Circuits have held that the United States can state a claim for relief under the federal common law. *United States v. Ira S. Bushey & Sons*, 346 F. Supp. 145 (D.Vt. 1972), aff'd, 487 F.2d 1393 (2d Cir. 1973), cert. denied, 417 U.S. 976 (1974); *United States v. Stoeco Homes*, 498 F.2d 597 (3d Cir. 1974), cert. denied, 420 U.S. 927 (1975). Similarly, in *Township of Long Beach v. City of New York*, 445 F. Supp. 1203, 1214 (D.N.J. 1978), the court held that a municipality is entitled to bring an action based on the federal common law of nuisance. In *City of Evansville, Indiana v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979), cert. denied, 100 S. Ct. 689 (1980), the plaintiffs were municipal corporations who were required to spend public funds because of pollution of an interstate waterway by acts done in another state. Standing to sue under the federal common law of nuisance was granted to those plaintiffs. Finally, in *Byram River v. Village of Port Chester*, 394 F. Supp. 618 (S.D.N.Y. 1975), the court extended standing to a private corporation (Byram River Pollution Abatement Association), a municipal corporation (the Town of Greenwich), and a private individual who owned land on the river's bank.

In opposition to respondents' standing under the federal common law of nuisance, petitioners rely on *Committee for Con. of Jones Falls Sewage System v. Train*, 375 F. Supp. 1148 (D.Md. 1974), affirmed on other grounds, 539 F.2d 1006 (4th Cir. 1976) (en banc); and *Parsell v. Shell Oil Co.*, 421 F. Supp. 1275 (D.Conn. 1976), aff'd without opinion sub nom. *East End Yacht Club, Inc. v. Shell Oil Co.*, 573 F.2d 1289 (2d Cir. 1977).

Both cases involved pollution which was local in nature and effect. In *Parsell* the court stated that, "no interstate effect is alleged in the complaint. The impact of the spill appears to be limited to Bridgeport Harbor." 421 F. Supp. at 1281. As noted in Section B, the *Jones Falls* case also involved an "intrastate controversy" which was "entirely local." The majority opinion stated that, "It is not contended that the alleged pollution of Jones Falls Stream has any effect outside the State of Maryland, and no other state is complaining of it." 539 F.2d at 1009. Thus, dismissal of the claims based on the federal common law of nuisance in the *Parsell* and *Jones Falls* cases was appropriate because of the absence of an interstate effect of the conduct in question. See, *Reserve Mining Co. v. Environmental Protection Agency*, 514 F.2d 492, 520 (8th Cir. 1975). The discussion of the standing of private parties under the federal common law of nuisance was therefore unnecessary to the holdings of these courts. It should further be noted that the Fourth Circuit in the *Jones Falls* case was closely divided; three of the participating judges dissented from the views of the five-judge majority.

In summary, the holding of the Third Circuit concerning the standing of private parties to sue under the federal common law of nuisance is consistent with this Court's decision in *Illinois v. City of Milwaukee*, and is also consistent with subsequent decisions by the lower courts.

2. *Monetary Damages Under the Federal Common Law of Nuisance*

As a logical extension of their narrow reading of this Court's decision in *Illinois v. City of Milwaukee*, petitioners have asserted that respondents' remedies under the federal common law of nuisance are limited to injunctive relief. This position was rejected by the Third Circuit, which reasoned that, "These plaintiffs have alleged sufficient individual damage to permit them to re-

cover damages for this essentially public nuisance . . . a private party may recover damages for a public nuisance if, while exercising the common right, he has suffered damages different in kind from those suffered by the public." (App. pp. 27a-28a). The Third Circuit went on to cite the Restatement (Second) of Torts §821C, illustration 11 and *Burges v. M/V Tamano*, 370 F. Supp. 247 (D.Me. 1973), where the court held that:

> [I]t would be incongruous to say that a man engaged in commercial fishing or clamming, and dependent thereon for his livelihood, who may have had his business destroyed by the tortious acts of another should be denied any right to recover for his pecuniary loss on the ground that his injury is no different in kind from that sustained by the general public.

Id. at 250.

The only Court of Appeals to consider the issue of the availability of monetary damages under the federal common law of nuisance is the Seventh Circuit. In the case of *City of Evansville, Indiana v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979), cert. denied, 100 S. Ct. 689 (1980), the court reached a conclusion which supports the holding of the Third Circuit on this issue. The Seventh Circuit stated that, "Whether or not defendants have breached any obligations for which they should be held liable to plaintiffs will be determined by judge-made rules. The consequences of any breach of duty imposed by the courts are necessarily also determined by the court." 604 F.2d at 1019.

This approach is entirely consistent with the decisions of this Court, such as, *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957) and *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). In the *Lincoln Mills* case, this Court stated, "It is not uncommon for federal courts to fashion federal law where fed-

eral rights are concerned." 353 U.S. at 457. Similarly, in *Bivens* this Court stated:

> That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition . . . Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong." *Bell v. Hood*, 327 U.S. at 684.

403 U.S. at 395-96.

The only support cited by petitioners for the proposition that respondents' remedies should be limited to injunctive relief is their own narrow reading of *Illinois v. City of Milwaukee*. The holding of the Court of Appeals concerning the availability of monetary damages is consistent with the decisions of this Court and the Seventh Circuit. Thus, there is no conflict among the circuits on this issue, and therefore review by this Court is unnecessary.

D. The holding of the Court of Appeals that state sewerage authorities are municipal corporations to whom sovereign immunity under the Eleventh Amendment does not apply is consistent with the decisions of this Court.

Petitioners in No. 79-1711 and No. 79-1754 assert that they are entitled to the defense of sovereign immunity under the Eleventh Amendment in federal damage suits. The Third Circuit summarily rejected this argument, on the grounds that, "These defendants are municipal corporations as to whom sovereign immunity under the Eleventh Amendment does not apply." (App. p. 36a.) These petitioners candidly admit that this Court

has reiterated on several recent occasions "that municipalities and political subdivisions or agencies of states do not enjoy tort immunity for purposes of the Eleventh Amendment," citing, *Monell v. N.Y.C. Department of Public Service,* 436 U.S. 658, 690, n. 54 (1978); *Lafayette v. Louisiana Power and Light Co.,* 435 U.S. 389, 412 (1978); and *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274, 280 (1977). (Petition of Middlesex County Sewerage Authority, et al., at 28.) However, petitioners contend that one of the seminal cases in this area, *Lincoln County v. Luning,* 133 U.S. 529 (1890) has been incorrectly relied upon in subsequent cases to support the proposition that municipalities and counties do not constitute the state for Eleventh Amendment purposes. In effect, petitioners are asking this Court to overturn a very well established line of cases simply because of a dispute as to the precise holding of one of the earlier cases in that line of decisions.

Regardless of the merits of the *Lincoln County* case, it is clear that the protection afforded by the Eleventh Amendment is limited by its terms to "one of the United States." That only "states" fall within the protection afforded by the Eleventh Amendment was recently reiterated by this Court in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391, 400-01 (1979):

> It is true, of course, that some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself. But this Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities even though such entities exercise a "slice of state power."

The Middlesex petitioners further contend that *Mt. Healthy City Board of Education v. Doyle,* supra, requires resort to state law to determine whether "the nature of the entity" is more like a political subdivision or municipal corporation than like "an arm of the state." Although petitioners assert that resort to New Jersey law establishes that the New Jersey Tort Claims Act "has conferred upon them the aegis of state sovereignty" (Petition of Middlesex County Sewerage Authority, et al., at 30), a brief review of the statutes cited in petitioners' appendix does not support this proposition. "State" is defined in N.J.S.A. 59:1-3 as meaning the "State and any office, department, division, bureau, board, commission or agency of the State, *but shall not include any such entity which is statutorily authorized to sue or be sued.*" (App. p. 109a). Among the powers granted by N.J.S.A. 40:14A-7 to sewerage authorities is the right "to sue and to be sued." (App. p. 110a).

In *Mt. Healthy City Board of Education v. Doyle* this Court found that, "Under Ohio law the 'State' does not include 'political subdivisions,' and 'political subdivisions' do include local school districts." 429 U.S. at 280. So, too, in the present case, it is clear that under New Jersey law the "State" does not include sewerage authorities because sewerage authorities are authorized to sue or be sued. Moreover, as explained at page 5 of the Middlesex Petition, these sewerage authorites are not funded by the state. Thus, a judgment against a sewerage authority does not have "essentially the same practical consequences as a judgment against the state itself." *Lake Country Estates,* supra. Therefore, the Third Circuit's disposition of this issue was clearly correct.

E. The holding of the Court of Appeals that state tort claims acts may not preempt federal statutory or common law is mandated by the Supremacy Clause of the United States Constitution.

Article VI, Clause 2 of the United States Constitution provides:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

To the extent that respondents have causes of action founded upon federal statutes or federal common law, it is quite clear, based upon the provisions of the Supremacy Clause, that a state may not purport to restrict the exercise of those rights. It is the position of petitioners in No. 79-1711 and 79-1754 that they may not be sued based upon a federally created tort claim for damages unless the plaintiffs have complied with the provisions of the New Jersey Tort Claims Act. That Act provides for notice to be given to the public entity within ninety days after the accrual of the cause of action. N.J.S.A. 59:8-8 (App. p. 109a-110a.) If a state may by statute require a plaintiff asserting a federal right to notify a state public entity within ninety days of the accrual of action, what would prevent the state from imposing a thirty-day notice requirement, or even a one-day notice requirement? It is clear that where there is a federally created right, conflicting state law and policy must yield. See, e.g., *Gibbons v. Ogden,* 9 Wheat. (22 U.S.) 1, 210-211 (1824); *Hines v. Davidowitz,* 312 U.S. 52, 66-67 (1941); *Lee v. Florida,* 392 U.S. 378, 386 (1968); *Perez v. Campbell,* 402 U.S. 637, 649 (1971).

F. Although the decision of the Court of Appeals concerning the existence of a private cause of action to enforce the terms of the FWPCA and MPRSA conflicts with the decision of the Seventh Circuit in *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (1979), it would not be appropriate for this Court to resolve this conflict by reviewing the present case because of alternative causes of action available to plaintiffs under the theories of federal common law of nuisance and maritime tort.

Petitioners have sought review of the Third Circuit's decision holding that plaintiffs have a private cause of action under FWPCA and MPRSA on the grounds that the Third Circuit's decision in this regard is in conflict with the decision of the Seventh Circuit in *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (1979). As has been previously noted, the legislative history of FWPCA and MPRSA and the better reasoned cases which have interpreted those statutes indicated that they have in no way preempted the federal common law of nuisance. Moreover, the authorities also indicate that private parties have standing to bring suit under the federal common law of nuisance and that they are entitled to not only injunctive relief, but monetary damages as well as other relief.

Accordingly, since respondents are entitled to proceed on their federal common law of nuisance claim as well as their claim under the theory of maritime tort, it is unnecessary for this Court to resolve the conflict between the Third Circuit and the Seventh Circuit with respect to the issue of the existence of a private cause of action under FWPCA and MPRSA.

In the event that review is granted on one or more elements of respondents' claim based upon the federal common law of nuisance, it is respectfully submitted that the Third Circuit's analysis concerning the existence of a private cause of action implied from the terms of FWPCA and MPRSA, and preserved by the savings

clauses of those Acts, on behalf of individuals or groups of individuals who have been or will be injured by pollution, is correct, and should be affirmed by this Court.

CONCLUSION

The petitions for a writ of certiorari to the Third Circuit Court of Appeals should be denied.

Respectfully submitted,

GERMAN, GALLAGHER & MURTAGH

By _____
Robert P. Corbin
Philip A. Ryan
Edward C. German
Dean F. Murtagh

Counsel for Respondents,
National Sea Clammers Association
and Gosta Lovgren

Nos. 79-1711, 79-1754, 79-1760

In the Supreme Court of the United States

OCTOBER TERM, 1979

MIDDLESEX COUNTY SEWERAGE AUTHORITY, ET AL., PETITIONERS

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.

JOINT MEETING OF ESSEX AND UNION COUNTIES, PETITIONER

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.

CITY OF NEW YORK AND ABRAHAM BEAME, PETITIONERS

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

WADE H. McCREE, JR.
Solicitor General

ANGUS MACBETH
Acting Assistant Attorney General

ALAN I. HOROWITZ
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1711

MIDDLESEX COUNTY SEWERAGE AUTHORITY, ET AL., PETITIONERS

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.

No. 79-1754

JOINT MEETING OF ESSEX AND UNION COUNTIES, PETITIONER

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.

No. 79-1760

CITY OF NEW YORK AND ABRAHAM BEAME, PETITIONERS

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.*

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

QUESTIONS PRESENTED

1. Whether the Federal Water Pollution Control Act, 33 U.S.C. (& Supp. I) 1251 *et seq.*, and the Marine

---

*Other petitioners in No. 79-1711 are Passaic Valley Sewerage Commissioners, Middletown Sewerage Authority, Bergen County Sewer Authority and the Linden Roselle Sewerage Authority.

The federal respondents are the Environmental Protection Agency, Russell E. Train, individually and as Administrator of EPA, United States Army Corps of Engineers, and Martin R. Hoffmann,

Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. (& Supp. I) 1401 *et seq.*, imply a private right of action independent of the rights explicitly created by the citizen suit provisions of those Acts, 33 U.S.C. 1365 and 33 U.S.C. 1415(g).

2. Whether private parties can bring an action under the federal common law of nuisance.

3. Whether a cause of action under federal law against a state municipality is barred because of a failure to comply with the notice requirement of a state tort claims statute (Nos. 79-1711, 79-1754).

4. Whether a damage claim against a New Jersey sewage disposal agency violates the Eleventh Amendment (No. 79-1711).

---

individually and as Secretary of the United States Department of the Army. Douglas M. Costle is now the Administrator of EPA and Clifford L. Alexander is now the Secretary of the Army.

Other respondents are Gosta Lovgren, New York Department of Environmental Conservation, Ogden R. Reid, individually and as Commissioner of the New York Department of Environmental Conservation, New Jersey Department of Environmental Protection, David J. Bardin, individually and as Commissioner of New Jersey Department of Environmental Protection, West Long Beach Sewer District, County of Westchester, Department of Environmental Facilities, City of Long Beach and City of Glen Cove.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Discussion 5

Conclusion 9

TABLE OF AUTHORITIES

Cases:

City of Milwaukee v. *State of Illinois*, cert. granted, No. 79-408 (Mar. 17, 1980) 7, 9

Committee for Consideration of Jones Falls Sewage System v. *Train*, 539 F. 2d 1006 6

Cort v. *Ash*, 422 U.S. 66 4

Illinois v. *City of Milwaukee*, 406 U.S. 91 ..... 3, 5, 6, 7

Lincoln County v. *Luning*, 133 U.S. 529 8-9

Mt. Healthy City Board of Education v. *Doyle*, 429 U.S. 274 8

Parsell v. *Shell Oil Co.*, 421 F. Supp. 1275, aff'd, 573 F. 2d 1289 6

United States v. *Ira S. Bushey & Sons, Inc.*, 363 F. Supp. 110 aff'd, 487 F. 2d 1393, cert. denied, 417 U.S. 976 7

Constitution, statutes and rule:

United States Constitution, Eleventh Amendment 4, 8

Page

Constitution, statutes and rule—Continued:

Federal Water Pollution Control Act (FWPCA or "Clean Water Act"), 33 U.S.C. (& Supp. I) 1251 *et seq.* 2

Section 505, 33 U.S.C. 1365 2

Section 505(e), 33 U.S.C. 1365(e) 4

Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA), 33 U.S.C. (& Supp. I) 1401 *et seq.* 2

33 U.S.C. 1415(g) 2

33 U.S.C. 1415(g)(1) 4

33 U.S.C. 1415(g)(5) 4

National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 3

28 U.S.C. 1331 ..... 3, 4

N.J. Stat. Ann. (West):

§ 40:14A-4 (1967) 9

§ 58:14-2 (1966) 9

New Jersey Tort Claims Act, N.J. Stat. Ann. § 59:1-1 *et seq.* (West. Cum. Supp. 1980-1981) 8

Fed. R. Civ. P. 12(b) 2

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a)[1] is reported at 616 F. 2d 1222. The opinion of the district court (Pet. App. 40a-67a) is unofficially reported at 12 E.R.C. 1118.

JURISDICTION

The judgment of the court of appeals (Pet. App. 37a-39a) was entered on February 5, 1980. The petitions for a writ of certiorari were filed on April 29, 1980 (No. 79-1711), and May 5, 1980 (Nos. 79-1754, 79-1760). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent National Sea Clammers Association is an association whose members earn their living harvesting fish and shellfish in the Atlantic Ocean off the coast of New York and New Jersey. Respondent Gosta Lovgren is an individual member of the association. On January 14, 1977, these two respondents brought suit, on behalf of themselves and all others similarly situated, against petitioners and the other respondents in the United States District Court for the District of New Jersey (Pet. App. 41a, 43a).

The complaint alleges that petitioners discharge dredge spoil, sewage and other toxic materials into the Atlantic Ocean and its tributaries. The complaint further alleges that these discharges caused a massive growth of algae in 1976 in an area extending up to twenty miles offshore from Long Island to Cape May, New Jersey. When this algae mass bloomed and died it allegedly settled on the ocean floor, and its decomposition allegedly created an oxygen deficiency that caused severe damage to marine

---

[1] "Pet. App." refers to the Appendix in No. 79-1711.

life in the area. The complaint charges that the discharges "have caused and continue to cause massive destruction of marine plant life, fish, clams, lobsters and other marine life unable to escape and thereby, has caused and continues to cause the collapse of the fishing, clamming and lobster industries which operate in the waters of the Atlantic Ocean." Complaint para. 39.

The complaint alleges violations of the Federal Water Pollution Control Act (FWPCA or "Clean Water Act"), 33 U.S.C. (& Supp. I) 1251 *et seq.*, the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA), 33 U.S.C. (& Supp. I) 1401 *et seq.*, other federal statutes and constitutional provisions, the federal common law of nuisance, and New Jersey and New York state statutes (Pet. App. 3a). The relief sought includes the imposition of fines and penalties against petitioners to be paid in part to the plaintiffs, and injunctive relief to prevent further dumping. In addition, the complaint seeks $250 million in actual damages and $250 million in punitive damages (Pet. App. 43a).

2. Petitioners and most of the other defendants moved to dismiss the claims under Fed. R. Civ. P. 12(b). The district court treated the motion as a motion for summary judgment and ordered the complaint dismissed with prejudice, except that some of the state law claims were dismissed without prejudice (Pet. App. 68a-70a).

The court dismissed the claims under the FWPCA and the MPRSA because the plaintiffs did not comply with the procedural requirements of the citizen suit provisions of those Acts, 33 U.S.C. 1365 and 33 U.S.C. 1415(g), in particular the requirement that 60 days' notice be given to EPA and to the alleged violator prior to the commencement of suit. The court also rejected the argument that an implied right of action exists under those statutes that is not subject to the specific requirements of the citizen suit

provisions and for which jurisdiction may be invoked under 28 U.S.C. 1331 (Pet. App. 49a-57a).

The court ruled that the federal common law of nuisance claim should be dismissed because private parties have no standing to bring such a claim (Pet. App. 46a-47a). The court also held that the plaintiffs' failure to comply with the notice provisions of the state statutes barred a tort suit against all but one of the petitioners (Pet. App. 62a-63a).[2] The court similarly found petitioners' maritime tort and other claims to be without merit and dismissed the complaint (Pet. App. 40a-67a).

3. The court of appeals reversed in part, reinstating the claims under the FWPCA and the MPRSA, the federal common law of nuisance and in maritime tort, and affirming the dismissal of the other claims.[3] The court ruled that private parties could maintain a federal common law of nuisance action under *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972). The court held that, although that case involved a state as plaintiff, the federal action established was applicable whenever there is a "clear and overriding federal interest in uniformity," regardless of the identity of the parties (Pet. App. 25a). Thus, it held that the federal common law of nuisance provided the plaintiffs with a remedy for the damage allegedly suffered (Pet. App. 23a-29a).

With respect to the claim under the FWPCA, the court of appeals agreed that the plaintiffs had not met the requirements of the citizen suit provision of that statute.

---

[2] The court did find that petitioner New York City had been given proper notice (Pet. App. 63a).

[3] The court vacated the dismissal of a claim under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, and remanded it for reconsideration in light of further development of the record.

The court, however, held that they had an alternate basis for suit under Section 505(e) of the FWPCA, 33 U.S.C. 1365(e), invoking jurisdiction under 28 U.S.C. 1331. Section 505(e) is a "savings clause," reciting that the citizen suit provision does not "restrict any right * * * under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief." Applying the analysis of *Cort* v. *Ash*, 422 U.S. 66 (1975), the court of appeals found that a private right of action should be implied under the FWPCA on behalf of individuals injured by pollution in violation of that statute (Pet. App. 12a-18a). This implied right of action, the court concluded, was "preserved" by the savings clause and therefore the plaintiffs could maintain their claims alleging violations of the FWPCA without reference to the restrictions imposed by the citizen suit provision.

The court of appeals then examined the similar citizen suit provision of the MPRSA and ruled that it was indistinguishable from that of the FWPCA for these purposes. Accordingly, it held that the savings clause of the MPRSA, 33 U.S.C. 1415(g)(5), also preserved an implied private right of action under that statute separate from the citizen suits authorized by 33 U.S.C. 1415(g)(1) (Pet. App. 18a-21a).

The court noted that the plaintiffs' failure to comply with the notice requirements of the state tort statutes did not bar suit on these federal common law and statutory causes of action (Pet. App. 35a n.49). It also rejected the contention of petitioners Middlesex County Sewerage Authority, Passaic Valley Sewerage Commissioners and Linden Roselle Sewerage Authority that the Eleventh Amendment required dismissal of the suit (Pet. App. 36a).

DISCUSSION

1. Petitioners contend (79-1711 Pet. 10-16, 79-1754 Pet. 7-11, 79-1760 Pet. 24-30) that the court of appeals erred in finding an implied private right of action under the FWPCA and MPRSA apart from the citizen suit provisions of those statutes. We agree and have also petitioned for certiorari on this issue. *Environmental Protection Agency, et al.* v. *National Sea Clammers Association, et al.*, No. 80-12 (filed July 3, 1980). For the reasons stated in our petition, we submit the present petitions for certiorari should be granted on this question.

2. Petitioners also contend (79-1711 Pet. 16-20, 79-1754 Pet. 12-15, 79-1760 Pet. 14-24) that the court of appeals erred in holding that private parties may bring an action under the federal common law of nuisance. In *Illinois* v. *City of Milwaukee*, *supra*, this Court held that Illinois had a federal common law remedy for injunctive relief against the City of Milwaukee to abate pollution of an interstate waterway. The Court focused on the fact that the plaintiff was a state government. The Court noted, however, that "it is not only the character of the parties that requires us to apply federal law." 406 U.S. at 105 n.6. The question presented by petitioners is whether the remedy made available to a state in *Illinois* v. *City of Milwaukee* is also available to private plaintiffs.

A resolution of this issue is of very limited concern to the federal respondents in this case. The court of appeals focused on the question of a suit for damages, against which sovereign immunity protects the federal respondents. Moreover, to the extent that the complaint alleges an action for injunctive relief under the federal common law of nuisance, such an action does not lie against the federal respondents for their regulatory activity, which is the source of the plaintiffs' primary

complaint.[4] A common law nuisance may be created by a discharge of pollutants, but one is certainly not created by a regulation or permit issued by a federal agency in the course of administering a regulatory program.

The question of the standing of private parties to bring a federal common law of nuisance action is one that has occasioned some disagreement in the lower courts, but this case is the first definitive court of appeals decision on the issue. In *Committee for Consideration of Jones Falls Sewage System* v. *Train*, 539 F. 2d 1006 (4th Cir. 1976), the court rejected the plaintiffs' contention that they had alleged a claim under the federal common law of nuisance. The court focused on the fact that the alleged nuisance had no interstate effects because the pollution was confined to Maryland, although it also noted that *Illinois* v. *City of Milwaukee* involved only a state plaintiff and that the common law action was perhaps preempted by amendments to the FWPCA. Similarly, in *Parsell* v. *Shell Oil Co.*, 421 F. Supp. 1275, 1281 (D. Conn. 1976), aff'd, 573 F. 2d 1289 (Table) (2d Cir. 1977), the plaintiffs' status as a private party was only one of three reasons why the court rejected a federal common law of nuisance claim. Accordingly, we do not believe that there exists at present a conflict in the circuits on this question that requires resolution by this Court.

Moreover, we believe that the court of appeals here correctly decided this issue. We do not agree with petitioners that a hard-and-fast rule should be established preventing private parties from ever invoking the federal common law of nuisance. The Court recognized in *Illinois* v. *City of Milwaukee*, *supra*, that the nature of the

---

[4]The plaintiffs' allegations that they are being harmed by waste dumped by the Army Corps of Engineers might make out a prima facie nuisance claim to the extent it is not barred by sovereign immunity.

parties, as well as other considerations, may require application of federal common law. See 406 U.S. at 105 n.6. In some cases, certainly, the need for a federal common law action may depend upon the identity of the plaintiff. Thus, when a nuisance has only intrastate effects on a navigable water of the United States, a nuisance action under state law may be sufficient to vindicate the interest of a private plaintiff, whereas application of federal law might be necessary if the plaintiff were a state or the United States. Cf. *United States* v. *Ira S. Bushey & Sons, Inc.*, 363 F. Supp. 110, 120 (D. Vt.), aff'd, 487 F. 2d 1393 (Table) (2d Cir. 1973), cert. denied, 417 U.S. 976 (1974). But where the nuisance affects an interstate body of water, creating a strong federal interest in uniformity, we see no reason why a private party should be barred from invoking the federal common law. In a situation where a federal remedy is appropriate, it should be available to any party. Although *Illinois* v. *City of Milwaukee, supra,* itself does not authorize suits by private parties, we believe that extension of its rationale to private plaintiffs is proper. In this case, where the affected body of water is the Atlantic Ocean, a federal remedy appears to be appropriate. Accordingly, although we did argue in the court of appeals, along with petitioners, that *Illinois* v. *City of Milwaukee* does not apply to private plaintiffs, we do not here contend that the court of appeals erred in its ruling on this question.

The question presented here, however, is one of substantial importance, and it is closely related to the question now before the Court in *City of Milwaukee* v. *State of Illinois,* cert. granted, No. 79-408 (Mar. 17, 1980). That case concerns the extent to which the federal common law of nuisance has survived in the wake of the 1972 amendments to the FWPCA. Indeed, petitioners in No. 79-1711 (Pet. 3, 21-24) and 79-1760 (Pet. 20-23)

alternatively raise that precise argument here, that the federal common law of nuisance has been preempted. The issue of the character of the plaintiffs who are entitled to bring an action under the federal common law of nuisance is a related subsidiary question if—as we urge—such an action is not wholly preempted.[5] Accordingly, we believe it would not be inappropriate for the Court to grant the petitions as to the question of private parties' standing to bring a federal common law of nuisance action.

3. Petitioners also contend (79-1711 Pet. 25-28, 79-1754 Pet. 15-19) that the plaintiffs' federal causes of action, if they exist, are barred by failure to comply with the New Jersey Tort Claims Act, N.J. Stat. Ann. § 59:1-1 *et seq.* (West Cum. Supp. 1980-1981). A state tort claims statute represents a limited waiver of sovereign immunity by the state. Suits under such a statute must be brought in accordance with the requirements of the statute. This limitation does not apply, however, to an action brought under federal law. Beyond the limited immunity conferred by the Eleventh Amendment, a state may erect no additional barriers to suits under federal law. Thus, unless the plaintiffs' causes of action are barred by the Eleventh Amendment, petitioners have no sovereign immunity defense, and the action is not dependent upon compliance with the New Jersey Tort Claims Act.

4. Petitioners do contend (79-1711 Pet. 28-30) that the plaintiffs' lawsuit is barred by the Eleventh Amendment. It is, however, well established that the bar of the Eleventh Amendment does not extend to counties or municipal corporations. See *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 280 (1977); *Lincoln*

---

[5]Of course, if Milwaukee prevails and the Court finds that the federal common law of nuisance has been preempted, the question of whether private parties may bring such an action would disappear.

County v. *Luning*, 133 U.S. 529, 530 (1890). Petitioners are municipal corporations, some of which are created by counties (see N.J. Stat. Ann. § 40:14A-4 (West 1967)) and thus clearly do not enjoy immunity under the Constitution. See also N.J. Stat. Ann. § 58:14-2 (West 1966).

CONCLUSION

The petitions for writs of certiorari should be granted as to the question of an implied private right of action under the FWPCA and MPRSA. As to the question of suit by private parties, the petitions may appropriately be granted for consideration with *City of Milwaukee* v. *State of Illinois*, No. 79-408. In all other respects, the petitions should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ANGUS MACBETH
Acting Assistant Attorney General

ALAN I. HOROWITZ
Assistant to the Solicitor General

AUGUST 1980

DOJ-1980-08

Nos. 79-1711; 79-1754; 79-1760; 80-12 (Consolidated)

Supreme Court, U.S.
FILED
DEC 4 1980
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MIDDLESEX COUNTY SEWERAGE AUTHORITY, *et al.*,
Petitioners (79-1711)

v.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

JOINT MEETING OF ESSEX AND UNION COUNTIES,
Petitioner (79-1754)

v.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

CITY OF NEW YORK AND ABRAHAM BEAME,
Petitioners (79-1760)

v.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Petitioners (80-12)

v.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER, THE JOINT MEETING OF ESSEX AND UNION COUNTIES

GEORGE J. MINISH,
Counsel for Petitioner, The Joint Meeting of Essex and Union Counties,
P.O. Box 236, 614 Eagle Rock Avenue,
West Orange, New Jersey 07052.
(201) 736-9622

MINISH AND WILLIAMS,
Attorneys.

PETITIONS FOR CERTIORARI FILED APRIL 29, 1980 (79-1711); MAY 5, 1980 (79-1754); MAY 5, 1980 (79-1760); JULY 3, 1980 (80-12)
CERTIORARI GRANTED OCTOBER 20, 1980

Questions Presented

1. Whether the Federal Water Pollution Control Act, 33 U.S.C. §1251 *et seq.*, and the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. §1401, *et seq.*, imply a private right of action independent of the rights explicitly created by the citizens suit provisions of those Acts, 33 U.S.C. §§1365(e) and 1415(g).

2. Whether a private citizen has standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution, as a general federal question under 28 U.S.C. §1331.

3. Whether any federal common law nuisance action for alleged damages sustained resulting from ocean pollution, if available to a private citizen, is not pre-empted by the present regulatory scheme governing ocean pollution established by the Federal Water Pollution Control trol Act and The Marine Protection, Research and Sanctuaries Act.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
OPINIONS AND JUDGMENTS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT:	
I—Neither the FWPCA as amended, nor the MPRSA as amended, imply a private right of action independent of the rights explicitly created by the citizens' suit provisions contained therein, 33 U.S.C. §§1365(e) and 1415(g)	10
II—A private citizen lacks standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution as a general question under 28 U.S.C. §1331	18
III—The present regulatory scheme governing ocean pollution established by the FWPCA and the MPRSA should preempt any federal common law nuisance action by a private citizen, if available, for alleged damages sustained resulting from ocean pollution	23
CONCLUSION	29

PAGE

Cases Cited

Byram River v. Village of Port Chester, 394 F. Supp. 618 (S.D.N.Y. 1975) 20

City of Evansville, Ind. v. Ky. Liquid Recycling, 604 F.2d 1008 (7 Cir. 1979) 6, 13-15

City of Highland Park v. Train, 519 F.2d 681 (7 Cir. 1975), cert. denied 424 U.S. 927 (1976) 6, 11, 12, 20

Committee for Con. of Jones Falls Sewage System v. Train, 375 F.Supp. 1148 (D.Md. 1974), affirmed on other grounds consistent with that of the District Court on the instant issue, 539 F.2d 1006 (4 Cir. 1976) 8, 19-22

Cort v. Ash, 422 U.S. 66 (1975) 6, 7, 14, 16, 17

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) 5, 8, 9, 18-24, 26

Natural Resources Defense Council, Inc. v. Callaway, 524 F.2d 79 (2d Cir. 1975) 11

Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692 (D.C. Cir. 1975) 11

Parsell v. Shell Oil Co., 421 F.Supp. 1275 (D.Conn. 1976) aff'd without opinion sub nom. East End Yacht Club, Inc. v. Shell Oil Co., 573 F.2d 1289 (2 Cir. 1977) 8, 20, 22, 23

Sierra Club v. Morton, 405 U.S. 727 (1972) 7, 15, 16

Stream Pollution Bd. of Ind. v. U.S. Steel Corp., 512 F.2d 1036 (7 Cir. 1975) 20

Touche-Ross & Co. v. Redington, 442 U.S. 560 (1979) 17

Township of Long Beach v. City of New York, 445 F. Supp. 1203 (D.N.J. 1978) 11

PAGE

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) 17

United States ex rel Scott v. United States Steel Corp., 356 F.Supp. 56 (D.Ill. 1973) 9, 24, 26

United States v. Ira S. Bushey & Sons, Inc., 346 F.Supp. 145 (D.Vt. 1972), aff'd 487 F. 2d 1393 (2 Cir. 1973) 9, 20, 24, 26

United States v. Stoeco Homes, Inc., 359 F.Supp. 672 (D.N.J. 1973) 20

United States v. United States Steel Corp., 356 F. Supp. 556 (N.D. Ill. 1973) 20

Statutes Cited

N.J.S.A. 40:63-68 3

28 U.S.C. (Judicial Code):

Sec. 1254(1) 2

Sec. 1331 .....i, 8, 11, 18

Sec. 1331(a) 1-7

33 U.S.C. (Rivers and Harbors Act of 1899):

Sec. 407 .....24, 26

33 U.S.C. (Federal Water Pollution Control Act, as amended):

Sec. 1151 et seq. 24, 26

Sec. 1160(c) 26

Sec. 1251 et seq. ..... i, 2

Sec. 1365 ..... 6, 14

PAGE

33 U.S.C. (Federal Water Pollution Control Act, as amended):

Sec. 1365(a) 15-18

Sec. 1365(a)(1) 7, 15

Sec. 1365(e) ..... i, 7, 10, 13-18

Sec. 1365(g) 7, 16

33 U.S.C. (Marine Protection Research and Sanctuaries Act):

Sec. 1401 et seq. ..... i, 3

Sec. 1401(b) 27

Sec. 1412 27

Sec. 1412(a) 27

Sec. 1412(c) 27

Sec. 1412a 27

Sec. 1415 28

Sec. 1415(g) ..... i, 10

Sec. 1415(g)(5) 10

Sec. 1416(d) 28

42 U.S.C. (Clean Air Act):

Sec. 7604 ..... 6, 12

Other Authorities Cited

S. Rep. No. 414, Reported in 1972, U.S. Code Cong. & Adm. News, 3668, 3746 13

S. Rep. No. 1301, Reported in 1972, U.S. Code Cong. & Adm. News, 4232, 4250 13

Nos. 79-1711; 79-1754; 79-1760; 80-12 (Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MIDDLESEX COUNTY SEWERAGE AUTHORITY, *et al.*,
Petitioners (79-1711)

v.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

JOINT MEETING OF ESSEX AND UNION COUNTIES,
Petitioner (79-1754)

v.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

CITY OF NEW YORK AND ABRAHAM BEAME,
Petitioners (79-1760)

v.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Petitioners (80-12)

v.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR PETITIONER, THE JOINT MEETING OF ESSEX AND UNION COUNTIES

Opinions and Judgments Below

The Opinion of the Court of Appeals for the Third Circuit, filed February 5, 1980, is reported at 616 F.2d 1222. The Opinion and Judgment of the Court of Appeals is reprinted in the Appendix to the Petition for Certiorari of Middlesex County Sewerage Authority, *et al* at pp. 1a and 38a, respectively; and in the Petition for Certiorari of Environmental Protection Agency, *et al* at pp. 1a and 32a, respectively.

The Opinion of the District Court for the District of New Jersey is unreported officially but appears at 12 E.R.C. 1118. The Opinion and Order of the District Court is reprinted in the Appendix for Certiorari of Middlesex County Sewerage Authority, *et al* at pp. 40a and 60a respectively; and in the Appendix to the Petition for Certiorari of Environmental Protection Agency, *et al* at pp. 35a and 60a, respectively.

Jurisdiction

This Court has jurisdiction to review the Judgment of the Court of Appeals for the Third Circuit by Writ of Certiorari under 28 U.S.C. §1254(1). The Judgment of the Court of Appeals was entered on February 5, 1980. The Petition for a Writ of Certiorari by this Petitioner was filed on May 5, 1980, and was granted by this Court on October 20, 1980.

Constitutional and Statutory Provisions Involved

The pertinent provisions of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1251 *et seq.* and

The Marine Protection, Research and Sanctuaries Act (MPRSA), 33 U.S.C. §1401 *et seq.*, involved in this case are reprinted in the Appendix of Middlesex County Sewerage Authority, *et al* at pp. 72a to 105a.

Statement of the Case

On January 14, 1977, plaintiffs, National Sea Clammers Association and Gosta Lovgren, on their own behalf and on behalf of a class of others allegedly similarly situated, commenced the instant action seeking both injunctive relief and damages against numerous Federal, New York and New Jersey State officials and agencies concerned either with the disposition of sewage or the administrative regulation of the activities of such agencies. Petitioner herein, the Joint Meeting of Essex and Union Counties (Joint Meeting), is an assembly of the members of the various municipalities comprising the Counties of Essex and Union, in the State of New Jersey, formed pursuant to N.J.S.A. 40:63-68, *et seq.*

The essence of plaintiffs' eleven count Complaint (Joint app. 18a, *et seq.*) is that the discharge of sewage and the dumping of sludge resulting from sewage treatment by the municipal defendants had caused damage to the clam, oyster and lobster beds in the Atlantic Ocean, thereby adversely affecting plaintiffs' commercial business of fishing, clamming and lobstering on the shores or in the waters of the ocean. The Complaint alleges that the defendants have caused damage to said beds by failing to carry out a series of statutory and constitutional duties designed to maintain pollution within certain respectable limits. Plaintiffs further contend that, since they are members of the class and purport to represent a class comprised of commercial fishermen engaged in the harvest

of clams, oysters, lobsters and fish in the Atlantic Ocean, they have the requisite standing to bring such an action.

The basic characterizations in law of the pertinent allegations made by plaintiffs in their Complaint against the Petitioner are essentially that Petitioner created and maintained a federal public nuisance resulting from the discharge of effluent and the dumping of sludge into New York Harbor and the Atlantic Ocean and that the Petitioner operated outside the scope of permits issued by various governmental authorities in direct violation of the FWPCA and MPRSA, thereby allowing the plaintiffs to commence a citizens' suit.

Petitioner and other defendants moved to dismiss the plaintiffs' claim for lack of subject matter jurisdiction in light of the fact that plaintiffs failed to provide a notice of their claims to the defendants as required by the FWPCA and MPRSA. Petitioner and the other defendants also urged that the plaintiffs, as private citizens, lacked the requisite standing to institute that part of the instant action based upon the federal common law of nuisance. The disposition of the issues presented on defendants' Motion to Dismiss by the Court below was as follows.

Regarding the claims asserted under the FWPCA and MPRSA, the District Court held that they must be dismissed because of plaintiffs' failure to timely serve notice on the defendants prior to institution of the action, as required by the respective statutes (pet. cert. app. 56a). While agreeing that strict adherence to the statutory notice provisions was required, the Court of Appeals reversed the holding of the District Court. In relying upon the "savings clauses" contained in the citizens' suit provisions of the Acts, the Court of Appeals held

that the absence of notice was not fatal because the "savings clauses" preserved any existing right of action under statute or common law. (Joint App. 10a).

Regarding plaintiffs' contention that they could maintain the instant litigation independent of any right pursuant to the "savings clauses" of the FWPCA and MPRSA as a right implied under those statutes and under the theory of federal common law of nuisance, the District Court held, relying primarily on *Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972), that the latter avenue of relief was available only in favor of states, not to private parties, and that the notice provisions of the statutes remained applicable to any actions brought pursuant to the "savings clauses" (pet. cert. app. 47a). The Court of Appeals reversed these determinations holding that a private federal common law nuisance claim was available through private citizens as well as an implied claim under the FWPCA and MPRSA (pet. cert. app. 28a-29a, 6a-14a).

Four Petitions for Certiorari were filed by a number of New Jersey Public Sewage Disposal Agencies, the City of New York and the Environmental Protection Agency. Said Petitions were granted by Order of this Court dated October 20, 1980, (Joint App. 48a). The questions were ordered limited to those set forth hereinabove.

Summary of Argument

1. Neither the FWPCA nor the MPRSA imply a private right of action independent of the rights explicitly created by the citizens' suit provisions contained therein. There is no dispute that the citizens' suit provisions of the FWPCA (which are analogous to the citi-

zens' suit provisions of MPRSA) were modeled after the citizens' suit provisions of the Clean Air Act, 42 U.S.C. §7604. There is dispute among the Circuits, however, as to whether the citizens' suit provisions of the FWPCA and MPRSA provide an exclusive jurisdictional basis for private actions to enforce the provisions of said Acts.

The more well-reasoned approach to a solution for this dilemma is contained in the holding in *City of Highland Park* v. *Train,* 519 F.2d 681 (7th Cir. 1975), which concluded that the savings clauses of the citizens' suit provisions of the Clean Air Act, which paralleled those of the FWPCA and MPRSA, provided the sole jurisdictional basis for private actions to enforce the provisions of the Act. Although the Court in *Highland Park, supra,* recognized the necessity of citizen participation in the enforcement of the provisions of the Act, it nevertheless pointed out the concern of Congress that such citizens' suits be made available in a such manner that already burdened federal courts would not become overburdened.

The legislative history embodied in the 1972 Senate Report on the FWPCA bill specifically notes that the savings clause provisions of the Act refer to any rights or remedies under "any other law" and not to the subject statute itself as concluded by the Court of Appeals below. The Court in *City of Evansville, Ind.* v. *Ky. Liquid Recycling,* 604 F.2d, 1008 (7th Cir. 1979), completely agreed with the interpretation contained in the Senate Report, thereby precluding the inference of any congressional intent to create a private right of action for damages under other provisions of the FWPCA. The Court in *City of Evansville, supra,* noted that §505, 33 U.S.C. §1365, was also applicable with respect to the third factor identified in *Cort* v. *Ash,* 422 U.S. 66, 78 (1975),

which required an evaluation of the legislative scheme vis-a-vis remedies sought. Upon examination of the legislative scheme, the Court concluded that the implication of a private right of action would be inconsistent with the congressional purposes of the act.

In line with Congress's intent to model the provisions of the FWPCA so as to be consistent with the holding of the Supreme Court in the case of *Sierra Club* v. *Morton,* 405 U.S. 727 (1972), the Court of Appeals below concluded that actions brought pursuant to §1365(a)(1) were to be in the nature of private attorney general actions instituted by non-injured citizens while those actions brought pursuant to §1365(e) were relegated to citizens who had been injured. However, a comparison of the statutory language of the Administrative Procedure Act, with which the Court in *Sierra Club, supra,* was concerned, and the language contained in §1365(g) of the FWPCA, clearly indicates that the only "citizens" who have standing to bring actions pursuant to those Acts must have an interest which is or may be adversely affected, thereby precluding private attorney general actions such as envisioned by the Court of Appeals below.

The Court of Appeals finally relied upon the four part test for finding an implied private cause of action established by the Supreme Court in *Cort* v. *Ash, supra.* In essence, said four part test boiled down to the ultimate determination as to whether congress intended to create the private remedy asserted. In conjunction with the undisputed purpose of the FWPCA to protect individuals from injury caused by the polluting activities of others and consistent with the conclusion that private attorney general actions are not allowable under the Act, the unmistaken conclusion results that the sole basis for relief for injured citizens is through the citizens suit provisions of the Acts.

2. A private citizen does not have standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution as a general federal question under 28 U.S.C. §1331.

In *Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972), the Supreme Court concluded that a cause of action in federal common law of nuisance for water pollution was available to the plaintiff therein. The Court of Appeals below extended the scope and effect of the decision in *Illinois, supra,* to allow such federal common law nuisance actions to be instituted by private citizens. In light of the fact that the Court in *Illinois, supra,* relied upon causes of action brought on behalf of states as legal precedent and decisions subsequent to *Illinois, supra,* have confined federal common law of nuisance actions to those brought on behalf of governmental plaintiffs, the conclusion of the Court of Appeals below is unfounded.

In the case of the *Committee for the Consideration of the Jones Falls Sewage System* v. *Train,* 375 F.Supp. 1148 (D.Md. 1977), aff'd on the other grounds, 539 F.2d 1006 (4th Cir. 1976), the District Court confirmed the existence of a body of federal common law of nuisance emanating from *Illinois, supra,* but specifically restricted said actions to those of plaintiffs seeking relief on behalf of states and the United States. Certainly, if the Supreme Court wished to extend the availability of federal common law nuisance actions beyond those instituted on behalf of governmental plaintiffs, then such an extension of scope would have been explicitly stated in its opinion.

Exception is also taken to the effect of the decision of the Court of Appeals below which allows private litigants to recover damages against the defendants herein. In line with the rationale of the District Court in *Parsell* v. *Shell Oil Company,* 421 F.Supp. 1275 (D.Conn. 1976),

aff'd without opinion sub nom., *East End Yacht Club, Inc.* v. *Shell Oil Company,* 573 F.2d at 1289 (2d Cir. 1977), it is inconceivable that even if the Court in *Illinois, supra,* envisioned actions based upon federal common law of nuisance by private litigants, those actions would be concerned with any relief other than the abatement of nuisances emanating from one state to another, and not for damages.

3. Any federal common law nuisance action by a private citizen for alleged damages sustained resulting from ocean pollution, if available, should be preempted by the present regulatory scheme governing ocean pollution established by the FWPCA and the MPRSA.

In *Illinois* v. *Milwaukee, supra,* the issue of federal statutory preemption of federal common law nuisance actions was first discussed. The Supreme Court concluded therein that federal statutory preemption did not exist at that time, but that new federal laws and new federal regulations may at some point in the future preempt the field of federal common law of nuisance. Subsequent decisions in the case of *United States* v. *Ira S. Bushey & Sons, Inc.,* 346 F.Supp. 145 (D.Vt. 1972) and *United States ex rel Scott* v. *United States Steel Corp.,* 356 F. Supp. 56 (D.Ill. 1973), also refused to accept federal statutory preemption of federal common law nuisance actions for water pollution, in line with *Illinois, supra,* but again with the proviso that such actions would be maintainable only until legislation had been passed effectively regulating and preventing the pollution of interstate waters. It is important to note that the nature of all the plaintiffs therein were governmental units and also that the effect of the 1972 and 1977 amendments of the FWPCA and the enactment of the MPRSA in 1972 had not really been felt at the time these decisions were rendered. It is respectfully submitted

that the regulatory nature and enforcement authority embodied in these Acts were precisely what the aforesaid decisions looked toward when leaving a door open for federal statutory preemption of federal common law nuisance actions in the future. Thus, the time is now at hand when federal common law nuisance actions are no longer necessary in light of the stringent water pollution restrictions now on the books and the widespread enforcement capability of the EPA established as a result thereof.

ARGUMENT

POINT I

Neither the FWPCA as amended, nor the MPRSA as amended, imply a private right of action independent of the rights explicitly created by the citizens' suit provisions contained therein, 33 U.S.C. §§1365(e) and 1415(g).

Contrary to the holding of the District Court below, the Court of Appeals held that the "savings clauses" of the FWPCA and MPRSA, 33 U.S.C. §§1365(e) and 1415(g)(5), respectively, imply a private cause of action against any person or governmental agency alleged to be in violation of an effluent standard or limitation under the Acts or an order by the EPA Administrator or State concerning such a standard. Using 33 U.S.C. §1365(e) as a model, the savings clauses of these acts essentially provide:

> "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."

It was recognized by both Courts below that the Circuits have differing opinions as to whether the citizens' suit provisions of the FWPCA and MPRSA provide an exclusive jurisdictional basis for private actions to enforce the provisions of said Acts. The D.C. and Second Circuits have held that the citizens' suit provisions are not exclusive, thereby allowing jurisdiction to be predicated alternatively on 28 U.S.C. §1331 without the necessity of complying with the notice requirements attendant to the citizens' suit provisions. *Natural Resources Defense Council, Inc.* v. *Train,* 510 F.2d 692 (D.C. Cir. 1974), *Natural Resources Defense Counsel, Inc.* v. *Callaway,* 524 F.2d 79 (2d Cir. 1975). However, in *City of Highland Park* v. *Train,* 519 F. 2nd 681 (7th Cir. 1975), the Seventh Circuit held that the citizens' suit provisions of the Clean Air Act, which paralleled those of the FWPCA and MPRSA, provided the *sole* jurisdictional basis for private actions to enforce the provisions of the Act. The District Court also noted that a District of New Jersey case had followed the lead of the D.C. and Second Circuits on this issue. *Township of Long Beach* v. *City of New York,* 445 F. Supp. 1203 (D.N.J. 1978).

The District Court believed that the Seventh Circuits' analysis and holding in *Highland Park, supra,* represented the more well-reasoned approach to this dilemma and thereby concluded that the savings clauses of the citizens' suit provisions of the FWPCA and MPRSA may allow alternate basis for jurisdiction pursuant to 28 U.S.C. §1331, but not without compliance with the notice requirements thereof. However, the Court of Appeals considered the holdings in the D.C. and Second Circuits to be more persuasively reasoned than that of the Seventh Circuit and, therefore, held that such a separate and distinct jurisdictional basis in fact existed. (pet. cert. app. 10a). There is no indication in the opinion of the Court of Appeals as to why the D.C. and Second Circuit Opinions represented

"more persuasively reasoned cases" than that of the Seventh Circuit.

Based upon the agreement of the Court of Appeals below that the citizens' suit provisions of the FWPCA were modeled after the citizens' suit provisions of the Clean Air Act, 42 U.S.C. §7604 (pet. cert. app. 4a and 11a), it would seem inconsistent that the Court of Appeals would not follow the reasoning in *Highland Park, supra,* which specifically dealt with the relationship of the savings clause and citizens' suit provisions in the Clean Air Act. The Court in *Highland Park, supra,* pertinently noted that the legislative history of the Clean Air Act:

> "Shows Congress's determination that citizen participation in the enforcement of standards and regulations under the Clean Air Act of 1970 be established. It also shows, however, that Congress intended to provide for citizens' suits in a manner that would be least likely to clog already burdened federal courts and most likely to trigger governmental action which would alleviate any need for judicial relief. It was in response to these concerns that the statutory notice provisions were included in Section 304. Congress's intention would be frustrated if the statutory mandate of Section 304(d) were ignored." 519 F. 2d at 690-691.

The Court went on to conclude that the savings clause of the Clean Air Act

> "expressing the general intention of Congress not to disturb existing rights to seek relief does not have the affirmative effect of removing conditions which existing law imposes on the exercise of those rights." 519 F. 2d at 693.

A further review of the legislative history of the savings clauses of the FWPCA and MPRSA will serve to illustrate the obvious inconsistencies of the Court of Appeals holding. With respect to the savings clause, the 1972 Senate Report on the FWPCA bill pertinently stated:

> ". . . it should be noted, however, that the section would specifically preserve any rights or remedies under *any other law*". (emphasis added) S.Rep. No. 414, Reported in 1972, *U.S. Code Cong. & Adm. News,* 3668, 3746.

Substantially the same reasoning is contained in the Senate Report on the MPRSA bill. S.Rep. No. 1301, reported 1972, *U.S. Code Cong. & Admin. News,* 4232, 4250. The Court of Appeals below interpreted the reference to "any statute" in §1365(e) to include the subject statute itself contrary to the clear intent noted in the above cited Senate Report that "any statute" means any statute other than the FWPCA itself. Although the Court of Appeals alluded to the aforesaid legislatve history of the FWPCA, it concluded that it was not presuaded by the stated interpretation of the wording of the Act offered in the Senate Report. (pet. cert. app. 16a).

Interestingly enough, the Seventh Circuit has once again provided us with a very well-reasoned decision on point dealing specifically with the savings clause provision of the FWPCA. In *City of Evansville, Ind.* v. *Ky. Liquid Recycling,* 604 F. 2d 1008 (7th Cir. 1979), the Court prefaced its discussion by alluding to the legislative history cited above. The Court then addressed itself to the interpretation contained in the Senate Report of the statutory phrase "under any statute or common law" as "under any other law" as follows:

> "Even if this is intended only as a paraphrase, it suggests that a right of action for damages must

> be found outside the Act itself. And Congress' rejection of all but two of the proposed exceptions to the requirement of a 60-day waiting period for a citizens suit, *see* note 16, *supra,* reinforces the evidence in §505 [1365] itself of an intent to circumscribe private rights of action under the FWPCA." 604 F. 2d at 1015.

A footnote to the Court's conclusion hereinabove indicated that if the language in the Senate Report was intended to state exactly what was meant by the phrase "any statute or common law" rather than as a mere paraphrase, then §505(e), 33 U.S.C. §1365(e) would preclude the inference of any congressional intent to create a private right of action for damages under other provisions of the FWPCA. Nonetheless, the Court was not dissuaded from concluding as it did that private rights of action were precluded under the savings clause. The Court in *City of Evansville, supra,* noted further that §1365 was also applicable with respect to the third factor identified in *Cort* v. *Ash,* 422 U.S. 66, 78 (1975), namely, "is it inconsistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?" 604 F. 2d at 1015.

The legislative scheme of §1365 was aptly stated by the Court as follows:

> "§505 evidences a congressional intent to carefully channel public participation in the enforcement of the Act. Before commencing a citizen suit, the plaintiff must give notice not only to the alleged violator, but to the Administrator and the State in which the violation occurs. If either the Administrator or the State initiates adequate enforcement proceedings, the private action is foreclosed, although the complainant is authorized to intervene

'as of right'. §505(b), 33 U.S.C. §1365(b)." 604 F.2d at 1015.

The Court then concluded that a private plaintiff may enforce compliance with the effluent standards and limitations, require the Administrator to perform a duty to act, and impose civil penalties by instituting a private suit under §505(a), 33 U.S.C. §1365(a). However, the Court went on to emphasize that the implication of a private remedy "would be inconsistent with the congressional purpose implicit in the Act of encouraging private participation in the enforcement of the Act within the channels expressly provided". 604 F. 2d at 1016.

In further support of its contention that a general private cause of action exists under the FWPCA and MPRSA, the Court of Appeals below rationalized that actions brought pursuant to §1365(a)(1) were to be in the nature of private attorney general actions instituted by non-injured citizens while those actions brought pursuant to §1365(e) were relegated to citizens who had been injured. The basis for this thesis proposed by the Court of Appeals is Congress' attempt to insure that the FWPCA would comply with the holding of the Supreme Court in the then-recent case of *Sierra Club* v. *Morton,* 405 U.S. 727 (1972). (pet. cert. app. 7a).

In *Sierra Club, supra,* the Supreme Court concluded that an environmental group would have standing to bring suit pursuant to the Administrative Procedure Act if it could allege an adverse effect on its interest. The Court of Appeals thrust was that it was Congress's intent consistent with the *Sierra Club* decision to provide generally for citizens' suits which would not be subject to the jurisdictional amount requirement but which would still allow for private attorney general enforcement. A comparison

of the statutory language, however, would seem to imply a somewhat different result. Section 1365(g) defines a "citizen" who is permitted to institute an action under §1365(a) as a "person or persons having an interest which is or may be adversely affected". It is interesting to note that the Court in *Sierra Club, supra,* also required that the person or persons instituting the suit must be "adversely affected". 405 U.S. at 740.

It would appear intuitively obvious that standing in both sections is predicated upon injury. Thus, the citizens contemplated by both §§1365(a) and (e), must be one in the same. This being the case, the rationale employed by the Court of Appeals appears to be completely misplaced and unable to support its conclusion that there is a private right of action independent of §1365(a).

In furtherance of its position, the Court of Appeals then relied upon the four part test for finding an implied private cause of action established by the Supreme Court in *Cort* v. *Ash, supra.* The factors referred to in *Cort* are:

> First, is the plaintiff "one of the class for whose special benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such remedy or to deny one? . . . Third, is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States so that it would be inappropriate to infer a cause of action based solely on federal law? 422 U.S. at 78.

The significance of the four part test established in *Cort* v. *Ash, supra,* was explained in *Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 575 (1979) wherein the Court stated:

> ". . . the Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action."

Further enforcement of the *Touche Ross* refinement was given by the Supreme Court in *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11, 15-16 (1979) wherein the Court noted that the "question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction". Thus, the ultimate determination is whether Congress intended to create the private remedy asserted.

There can be no dispute that one of the primary purposes behind the passage of the FWPCA was the protection of individuals from injury caused by the polluting activities of others. Consistent with this purpose, those individuals suffering actual injury by the pollution should be given a means by which their injury could be judicially addressed. As previously noted, the Court of Appeals concluded that §1365(a) allowed for private attorney general actions to be instituted by non-injured citizens. Burdened by this conclusion in applying the factors established in *Cort* v. *Ash,* as furthered modified and explained in *Touche Ross, supra,* and *Transamerica Mortgage, supra,* the Court of Appeals below could only conclude that the only available means for the institution of judicial action by injured citizens was through the provisions of §1365(e), which would thus be consistent with the intent of Congress to

provide protection to those who are likely to be injured. The holding of the Court of Appeals that §1365(a) provided a private attorney general cause of action precluded any other conclusion.

Unburdened by the Court of Appeals' conclusion that a private attorney general right of action exists, the determination that a private remedy exists for citizens injured by violation of the act would also be consistent with the purposes of the act. However, under the latter thesis, the private right of action would exist pursuant to §1365(a) as further modified and explained in §1365(e). Thus, while both theses provide for a private remedy, the latter would only provide for one within the context of the FWPCA and MPRSA.

It is respectfully submitted that the legislative scheme intended and as enacted by Congress envisioned private remedies only for those citizens injured as a result of water pollution. Thus, a private right of action independent of the citizen's suit provisions does not exist.

POINT II

A private citizen lacks standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution as a general federal question under 28 U.S.C. §1331.

In reliance upon the holding of the Supreme Court in *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972) contrary to that of the District Court, the Court of Appeals below held that a cause of action in federal common law of nuisance for water pollution did extend to private citizen plaintiffs. It is respectfuly submitted that the Court of Appeals

below has extended the scope and effect of the decision of this Court in *Illinois* v. *Milwaukee, supra,* to a point far beyond that for which it was intended.

The principal issue for this Court in *Illinois* v. *Milwaukee, supra,* was "whether pollution of interstate or navigable waters creates an action arising under the 'laws' of the United States within the meaning of §1331(a)". 406 U.S. 91 at 99. In holding that such an action does arise pursuant to §1331(a), the Supreme Court pertinently stated:

> "As the field of federal common law has given necessary expansion to matters of federal concern and relationship (where no applicable federal statute exists, as there does not here), the ecological rights of a State in the improper impairment of them from sources outside the States own territory, now would and should be, we think, held to be a matter having basis and standard in federal common law and so directly constituting a question arising under the laws of the United States." 406 U.S. at 99-100

In so holding, the Court relied upon actions brought on behalf of states as legal precedent, thereby precluding a carte blanche basis for permitting such actions instituted by other then state plaintiffs.

Subsequent to the decision in *Illinois* v. *Milwaukee, supra,* the lower Federal Courts have consistently and almost without exception confined federal common law of nuisance actions to those brought on behalf of state plaintiffs and by the United States. See, e.g., *Committee for Con. of Jones Falls Sewage System* v. *Train,* 375 F. Supp. 1148 (D.Md. 1974), affirmed on other grounds consistent with that of the district court on the instant issue, 539 F.2d

1006 (4th Cir. 1976) en banc); *Parsell* v. *Shell Oil Co.*, 421 F. Supp. 1275 (D. Conn. 1976), aff'd without opinion *sub nom. East End Yacht Club, Inc.* v. *Shell Oil Co.*, 573 F.2d 1289 (2 Cir. 1977); *Stream Pollution Bd. of Ind.* v. *U.S. Steel Corp.*, 512 F. 2d 1036 (7th cir. 1975) (private citizen denied intervention); cf. *Highland Park* v. *Train, supra,* 519 F.2d 681); but see *Byram River* v. *Village of Portchester,* 394 F.Supp. 618 (S.D.N.Y. 1975); *United States* v. *Ira S. Bushey & Sons, Inc.,* 346 F. Supp. 145 (D. Vt. 1972) 363 F. Supp. 110 (D. Vt. 1973), aff'd 487 F.2d 1393 (2d Cir. 1973), cert. den., 417 U.S. 976, 94 S. Ct. 3182, 41 L.Ed. 2d 1146 (1976); *United States* v. *United States Steel Corp.,* 356 F. Supp. 556 (N.D. Ill. 1973); *United States* v. *Stoeco Homes, Inc.,* 489 F.2d 597 (3d Cir. 1974), *cert. den.* 420 U.S. 927, 95 S. Ct. 1124, 43 L.Ed. 2d 397 (1975).

In the case of *Committee for Con. of Jones Falls Sewage System* v. *Train, supra,* the District Court concluded that an individual citizen could not bring an action based upon the theory of federal common law of nuisance. The rationale applied by the District Court therein in reliance on *Illinois* v. *Milwaukee, supra,* was that a cause of action in federal common law of nuisance was found to exist in the latter case because of the "character of the plaintiffs as governmental units". 375 F. Supp. at 1153. In its affirmance, the Court of Appeals for the Fourth Circuit further solidified the development of a body of federal common law of nuisance eminating from *Illinois* v. *Milwaukee, supra,* and cases relied upon therein, while still maintaining the constraint that a cause of action brought under this theory was available only to those plaintiffs seeking relief on behalf of states, with one exception. The Court further noted:

> "Perhaps with the exception of actions by the United States to abate public nuisances created in navig-

> able waters by polluters, (citations omitted) but consistent with Section 1251(b)[FWPCA], the doctrine of *Illinois* v. *Milwaukee* has not been extended beyond the abatement of public nuisance in interstate controversies where the complainant is a state and the defenders are creating extra territorial harm." 539 F.2d at 1009.

In its holding, the Court of Appeals below relied heavily (pet. cert. app. 25a) upon Footnote 6 in *Illinois* v. *Milwaukee,* 406 U.S. at 105, which stated in pertinent part:

> "Thus it is not only the character of the parties that requires us to apply federal law . . . [W]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interest of federalism, we have fashioned federal common law."

In essence, the Court of Appeals construed the language of said footnote as allowing a non-sovereign to institute a federal common law of nuisance action if the subject federal question to be considered required federal uniformity. The contra-holding in *Committee for Con. of Jones Falls Sewage System* v. *Train, supra,* with respect to the same footnote, contains a more persuasively reasoned analysis of the intent of the Court in *Illinois* v. *Milwaukee.* The Court specifically noted therein:

> ". . . this statement [it is not only the character of the parties that requires us to apply federal law] can be read in at least two different ways. It could mean (a) that there were other considerations sufficient in themselves to require application of federal law, or (b) that there were other federal interests which in addition to the character of the

> parties required the application of federal law although those other interests in themselves would not have been sufficient. In the view this Court takes of the basis for the Supreme Court's decision, the latter interpretation is the proper one. 375 F. Supp. at 1154, n.12.

It is obvious almost without question that the foregoing analysis should be relied upon by this Court as the only basis for its decision regarding a private citizens' standing to maintain a federal common-law nuisance action. If the Supreme Court in *Illinois* envisioned that such actions should be available to private citizens, there is no reason that the opinion would not, or could not, have so explicitly stated same. However, by specifically constraining its decision to the class of plaintiffs therein, the Supreme Court let it be known that its determination regarding the availability of federal common law nuisance actions should not be extended beyond the context in which it was stated, as was so aptly construed in *Committee for Con. of Jones Falls Sewage System* v. *Train, supra.*

Exception is not only taken to the decision of the Court of Appeals below to extend the doctrine of *Illinois* v. *Milwaukee, supra,* to private citizen plaintiffs, but also to the effect of the Court of Appeals decision which would allow private litigants to recover damages against the defendants herein. It is respectfully submitted that even if the Court in *Illinois* v. *Milwaukee, supra,* envisioned actions based upon federal common law of nuisance by private litigants, those actions would only be concerned with abatement of nuisances eminating from one state into another, and not for damages.

The pure and simple reasoning forming the basis of this exception was very aptly and succinctly stated by the District Court in *Parsell* v. *Shell Oil Co., supra,* as follows:

> "Finally, there is justification for limiting any right of action under *Illinois* v. *Milwaukee* to private parties seeking injunctive relief rather than damages. Part of the reason why the Supreme Court encouraged the development of the federal common law of water pollution in *Milwaukee* was the need for resolution of intricate and highly important questions of the appropriate water quality standards to apply. As the Court said, 'these will be equity suits in which the informed judgment of the chancellor will largely govern.' 406 U.S. at 107-108, 92 S. Ct. at 1395. A jury awarding damages in an oil spill case with wholly intrastate impact would be contributing to the development of evolving water quality standards only in the most *ad hoc* way." 421 F.Supp. at 1281-1282.

It is respectfully submitted that the rationale of the District Court in *Parsell* v. *Shell Oil Co., supra,* is completely correct and equally as appropriate in the instant case. Damage suits were not contemplated in *Illinois,* nor is there any reason for them to be contemplated now.

POINT III

The present regulatory scheme governing ocean pollution established by the FWPCA and the MPRSA should preempt any federal common law nuisance action by a private citizen, if available, for alleged damages sustained resulting from ocean pollution.

The issue of federal statutory preemption of federal common law nuisance actions was first discussed by this Court in *Illinois* v. *Milwaukee, supra.* Therein, the Court noted that:

> "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of public nuisance by water pollution." 406 U.S. at 107.

In reliance upon the Supreme Court's observation regarding preemption in *Illinois* v. *Milwaukee, supra,* the Court in *United States* v. *Ira S. Bushey & Sons, Inc., supra,* in denying a motion to dismiss the complaint, held, *inter alia,* that the numerous laws which Congress enacted to prohibit or control pollution of interstate or navigable waters did not establish in themselves the exclusive means by which federal policy and interest concerning the quality of water under federal jurisdiction might be protected in federal courts. In reference to *Illinois* v. *Milwaukee, supra,* the Court noted that it was made clear therein that the application of federal common law to abate a public nuisance in interstate and navigable waters was not inconsistent with the Water Pollution Control Act, the River and Harbors Act of 1899, or any other legislation yet enacted, thereby precluding the Court from accepting an argument that the existing federal statute preempted a federal common law of nuisance action.

In *United States ex rel Scott* v. *United States Steel Corp.,* 356 F. Supp. 56 (D.Ill. 1973), it was held that an Amendment to the Federal Water Pollution Control Act (33 U.S.C. §1151 et seq.), giving the Environmental Protection Agency the power to adopt and enforce regulations governing the pollution of interstate waters, did not preclude federal court jurisdiction of common law nuisance suits involving interstate waters. In that case, the United States and the State of Illinois filed a complaint which,

inter alia, claimed a federal common law right of action in nuisance to abate an alleged pollution of Lake Michigan, an interstate body of water. The Court concluded that it did not find any provision in the amendment, which became effective 12 days after the filing of the action, purporting to abolish the federal common law of nuisance, but rather it found an intention to supplement and amplify any pre-existing remedies. It was hornbook law, the Court pointed out, that statutes will not be construed in derogation of common law unless such intent is clear. The Court ultimately concluded that the plaintiff governments were free to maintain such an action at least until the Environmental Protection Agency had acted effectively in the area of regulating the pollution of interstate waters.

It is important to note that these three cases were commenced prior to the enactment of the MPRSA in 1972 and the 1977 amendments of the FWPCA and also prior to the time when the practical effects of the 1972 amendments of the FWPCA could be felt. Also, since the plaintiffs in these three cases were two states and the United States Government, the Courts' holdings that preemption did not exist at that time should only be construed as favorable to plaintiff governments.

The aforesaid holdings that federal common law nuisance actions involving water pollution were not preempted by then existing federal laws or regulations in that area did not in any way present an absolute bar to federal preemption in the future. Rather, these holdings looked toward a time when federal laws and regulations would have established a firm and effective network for the regulation and prevention of pollution of interstate waters under the auspices of the Environmental Protection Agency. It is respectfully submitted that the statutory and practical effect of the FWPCA 1972 and 1977 amendments and the

enactment of the MPRSA in 1974 is that the expectations envisioned in the aforesaid holdings have now been realized.

Thus, the more firmly established and comprehensive laws and regulations with respect to the prevention of water pollution now on the books accompanied by an effective enforcement arm in the EPA have precluded the necessity for federal common law nuisance actions by private citizens at this time. A cursory review of the changes and enhancements to federal water pollution control legislation as it has evolved since 1972 clearly supports the contention that statutory preemption of common law nuisance actions regarding water pollution should be the norm, rather than the exception.

Prior to 1972, the extent of federal water pollution control was embodied in 33 U.S.C. (1970 ed.) §1151 *et seq.* and Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. §407. The essential thrust of this water pollution legislation was the setting of ambient water quality standards to establish permissible levels of pollution in interstate waters, with the states being given primary responsibility for developing said standards along with the implementation and enforcement thereof. 33 U.S.C. (1970 ed.) §1160(c). The EPA did have the right to promulgate its own water quality standards should a state either fail to establish a water quality standard or to promulgate an inadequate one. 33 U.S.C. (1970 ed.) §1160(c).

By the promulgation of the 1972 and 1977 amendments to the FWPCA, the standards for elimination of water pollution were changed, the regulatory and enforcement process and procedures were more specifically defined and tightened, and the role of the EPA therein was greatly enhanced.

The specific statutory amendments are too numerous to set forth herein and their significance relative to the prior

enactments would have to be emphasized in great detail. Suffice it to say, however, that judicial notice will clearly reveal that the overall scope and effect of the 1972 and 1977 FWPCA amendments far overshadow the legislative scheme in effect prior thereto.

Of more significant impact to the case at hand was the enactment of the MPRSA in 1972. The primary concern of the MPRSA is the overall regulation of the dumping of materials into ocean waters and the strict limitation of the dumping of any materials which would "adversely affect human health, welfare or amenities, or the marine environment, ecological systems, or economic potentialities." 33 U.S.C. §1401(b).

In order to affectuate the aforesaid policy, a dumping permit program was established whereby the EPA would be authorized to issue permits for dumping material into ocean waters where the Administrator determined "that such dumping will not unreasonably degrade or endanger human health, welfare, or amenities or the marine environment, ecological systems or economic potentialities." 33 U.S.C. §1412. Various criteria were established by which the Administrator was to make this determination, 33 U.S.C. §1412(a) and authorization was given to the Administrator to designate the site and time for dumping. 33 U.S.C. §1412(c). Pursuant to 33 U.S.C. §1412a, enacted in 1977, the Administrator of the EPA was directed to end the dumping of sludge into ocean waters as soon as possible after the date of the enactment of that section, but in no case could the Administrator issue any permit or renewal thereof "which authorizes any dumping after December 31, 1981."

Consistent in scope and effect with the FWPCA are the other provisions of the MPRSA, e.g., the detailed civil

and criminal sanctions for enforcement of the Act, §1415; the interaction between the Administrator and the states and the attendant rights and obligations of the parties thereto, 33 U.S.C. §1416(d); the substantial funding programs established by the act for the purpose of the design and creation of suitable land based alternatives for the disposition of sewage sludge to be available at the time when dumping is no longer permitted; and the mandating of extensive and comprehensive research programs directed toward a further definition of the problems inherent with dumping chemicals or toxicants into ocean waters and the scientific, technological and economic factors which go into the solution thereof.

The legislative format for the regulation and prevention of water pollution as it stands now, compared with that in existence at the time of the aforesaid Court decisions regarding federal preemption in this area, *Illinois* v. *Milwaukee, supra, United States* v. *Ira S. Bushey and Sons, Inc., supra,* and *United States ex rel Scott* v. *United States Steel Corp., supra,* clearly exemplifies that type of federal regulation and control of the pollution of interstate waters called for by those decisions. Having reached the point where the EPA has been given and has effectively assumed the complete authority for the regulation and prevention of water pollution through the promulgation of regulations and the enforcement thereof, there is no longer a need for actions by private citizens injured by violations of the FWPCA or MPRSA, and regulations promulgated thereunder, to be commenced other than through the citizens' suit framework and provisions embodied in those Acts.

The conclusion that federal preemption of federal common law nuisance actions is now at hand is not in any way lessened in effect by the existence of the savings' clauses

contained in the citizens' suit provisions of the Acts. Having come into effect at the time of the enactment of the FWPCA and MPRSA, the savings' clauses insured the availability of alternative remedies outside the provisions of the Acts, including, but not limited to, those available at common law. The decisions noted herein also recognized a need for such common law actions at that time. However, as we have noted, the practical application of the regulatory and enforcement provisions contained in the Acts has attained the stature envisioned at the time of the enactment of the Acts. Thus, it is not inconsistent at this point in time to preclude federal common law nuisance actions as an available remedy under the savings' clause provisions of the Acts; their necessity is outdated and their practical effect at this time would wreck havoc on the strides taken and achieved by the EPA in its successful task of regulating and preventing the pollution of our waters.

CONCLUSION

For the reason stated, Petitioner respectfully prays that the judgment below should be reversed in part consistent with Petitioner's stated position herein on the questions for review as limited by this Court.

Respectfully submitted,

GEORGE J. MINISH,
Counsel for Petitioner, The Joint Meeting of Essex and Union Counties.

Nos. 79-1711; 79-1754; 79-1760; 80-12 (Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Supreme Court, U. S.
FILED
DEC 2 1980
MICHAEL RODAK, JR., CLERK

MIDDLESEX COUNTY SEWERAGE AUTHORITY, *et al.*,
Petitioners (79-1711)

v.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

JOINT MEETING OF ESSEX AND UNION COUNTIES,
Petitioner (79-1754)

v.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

CITY OF NEW YORK AND ABRAHAM BEAME,
Petitioners (79-1760)

v.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Petitioners (80-12)

v.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONERS MIDDLESEX COUNTY SEWERAGE AUTHORITY, TOWNSHIP OF MIDDLETOWN SEWERAGE AUTHORITY AND BERGEN COUNTY SEWERAGE AUTHORITY

STEPHEN J. MOSES
1 Essex Street
Hackensack, New Jersey 07601
(201) 343-6612
Counsel for Petitioner,
Bergen County Sewerage Authority
MENELAOS W. TOSKOS
Of Counsel

VINCENT J. JENNINGS
Of Counsel for Petitioner
Township of Middletown Sewerage Authority
Furman & Jennings, Attorneys

MILTON B. CONFORD
Wilentz, Goldman & Spitzer
A Professional Corporation
900 Route 9
Woodbridge, New Jersey 07095
(201) 636-8000
Counsel for Petitioners,
Middlesex County Sewerage Authority and
Township of Middletown Sewerage Authority
FRANCIS X. JOURNICK
MARVIN J. BRAUTH
Of Counsel

PETITIONS FOR CERTIORARI FILED APRIL 29, 1980 (79-1711); MAY 5, 1980 (79-1754); MAY 5, 1980 (79-1760); JULY 3, 1980 (80-12)
CERTIORARI GRANTED OCTOBER 20, 1980

Questions Presented for Review*

1. Whether the Federal Water Pollution Control Act, 33 *U.S.C.* (& Supp. I) §§ 1251 *et seq.*, and the Marine Protection Research and Sanctuaries Act of 1972, 33 *U.S.C.* (& Supp. I) §§ 1401 *et seq.*, imply a private right of action independent of the rights explicitly created by the citizens suit provisions of those Acts, 33 *U.S.C.* §§ 1365(e) and 1415(g).

2. Whether a private citizen has standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution as a general federal question under 28 *U.S.C.* § 1331.

3. Whether any federal common law nuisance action for alleged damages sustained resulting from ocean pollution, if available to a private citizen, is not preempted by the present regulatory scheme governing ocean pollution established by the Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act.

---

* These are the questions to which the review is limited under the grant of certiorari (J.A. 48a).

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	(after cover)
CASES CITED	ii
STATUTES CITED	iv
RULES CITED	viii
LEGISLATIVE REPORTS CITED	ix
OTHER AUTHORITIES CITED	ix
LIST OF PARTIES	1
OPINIONS AND JUDGMENTS BELOW	1
JURISDICTION OF SUPREME COURT	1
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	7
ARGUMENT:	
Point I—Neither the FWPCA, as amended, nor the MPRSA, as amended, imply a private right of action under those statutes independent of the citizens suit provisions thereof	12
Point II—The jurisdiction of federal courts under 28 U.S.C. §1331 to entertain federal common-law nuisance actions brought on behalf of plaintiff states for alleged damages from ocean pollution does not extend to private citizen plaintiffs	19
1. Illinois v. Milwaukee envisaged only suits at the instance of states or state agencies	19

PAGE

2. Illinois v. Milwaukee authorized only a suit for abtement of nuisance, not an action for damages 23

3. Policy considerations relative to the best interests of a national water pollution strategy argue for restriction of the federal nuisance action 24

Point III—If a federal common-law nuisance action for ocean pollution is otherwise available to a private citizen, such an action should be held preempted by the present regulatory scheme in that area established by the FWPCA and the MPRSA 31

1. The "savings clause" of FWPCA and MP RSA do not preclude a finding of preemption 32

2. The present scope of FWPCA and MPRSA justifies preemption of federal common-law nuisance actions against sewerage agencies which discharge effluent and dump sewerage sludge under permits pursuant to those statutes 34

(a) FWPCA is now of preemptive scope 35

(b) MPRSA is of preemptive scope 40

3. Considerations of law and policy bespeak preemption in this area 43

CONCLUSION 47

Cases Cited

Burbank v. Lockheed, 411 U.S. 624 (1973) 33, 43

Byram River. v. Village of Portchester, 394 F.Supp. 618 (S.D.N.Y. 1975) 21

PAGE

Califano v. Sanders, 430 U.S. 99 (1977) 15, 33

Cannon v. University of Chicago, 441 U.S. 677 (1979) 17

City of Evansville, Ind. v. Ky. Liquid Recycling, 604 F.2d 1008 (7 Cir. 1979) 14, 17, 18, 21

City of Highland Park v. Train, 519 F.2d 681 (7 Cir. 1975), cert. den. 424 U.S. 927 (1976) 14, 15, 21

Committee for Con. of Jones Falls Sewage System v. Train, 375 F.Supp. 1148 (D. Md. 1974), affirmed on other grounds consistent with that of the district court on the instant issue, 539 F.2d 1006 (4 Cir. 1976) 21-23, 44, 45

Com. of Mass. v. United States Veterans Admin., 541 F.Supp. 119 (1 Cir. 1976) 31

Conservation Soc. of S. Ver. Inc. v. Secretary of Tran., 508 F.2d 927 (2 Cir. 1974) 15

Cort v. Ash, 422 U.S. 66 (1975) 7, 8, 14, 16, 18

EPA v. Water Resources v. Water Resources Control Board, 426 U.S. 200 35-37

East End Yacht Club, Inc. v. Shell Oil Co., 573 F.2d 1289 (2 Cir. 1977) 21

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 29

Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) 20

Hinderlider v. La Plata R. and Cherry Creek D. Co., 304 U.S. 92 (1938) 20

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) ..6, 9, 10, 19-25, 27, 34, 40, 44

Jones v. Roth Packing Co., 430 U.S. 519 (1977) 33, 43

Natural Resources Defense Council v. Callaway, 524 F.2d 79 (2 Cir. 1975) 15

PAGE

Natural Resources Defense Council Inc. v. Train, 510 F.2d 692 (D.C. Cir. 1975) 15

New England Legal Foundation v. Costle, 475 F.Supp. 425 (D.Conn. 1979) 44

Parsell v. Shell Oil Co., 421 F.Supp. 1275 (D. Conn. 1976), aff'd without opinion sub nom. 21, 22

People of State of Ill. v. City of Milwaukee, 599 F.2d 151 (7 Cir. 1979) 44

Philadelphia v. New Jersey, 437 U.S. 617, n.4 (1978) ..33, 43

Potomac River Ass'n. Inc. v. Lundeberg Maryland Seamanship Schools, 402 F.Supp. 344 (D. Md. 1975) 44

Sierra Club v. Morton, 405 U.S. 727 (1972) 16

Stone v. Powel, 428 U.S. 465 (1976) 29

Stream Pollution Bd. of Ind. v. U.S. Steel Corp., 512 F.2d 1036 (7 Cir. 1975) 21

Texas v. Pankey, 441 F.2d 236 (10 Cir. 1971) 20, 21, 25

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) 7, 8, 16, 18

Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11 (1979) 7, 8, 16-18

United States v. Atlantic-Richfield Co., 478 F.Supp. 1215 n.5 (D. Mont. 1979) 45

Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966) 30

Wheeldin v. Wheeler, 373 U.S. 647 (1963) 29

Statutes Cited

Administrative Procedure Act:
Sec. 10 15

PAGE

L. 1948, c. 758 5

N.J.S.A. 40:14A-1 3

N.J.S.A. 40:14B-1 3

N.J.S.A. 40:14B-4 7

N.J.S.A. 58:14-1 3

N.J.S.A. 58:14-2 7

15 U.S.C. (Consumer Product Safety Act):

Sec. 24 18

Sec. 2051, et seq. 18

Sec. 2072 18

Sec. 2073 18

Sec. 2619(c)(3) 32

28 U.S.C.:

Sec. 1254(1) 1

Sec. 1331 ..... 15, 19

Sec. 1331(a) 15

33 U.S.C. (Clean Water Act of 1977) (Federal Water Pollution Control Act, as amended) (Supp. I):

Sec. 41 2

Sec. 407 ..... 5, 35

Sec. 1151 et seq. 35

Sec. 1160(a) 35

Sec. 1160(c) 35

Sec. 1160(c)(1) 35

Sec. 1160(c)(3) 35

PAGE

33 U.S.C. (Clean Water Act of 1977) (Federal Water Pollution Control Act, as amended) (Supp. I):

Sec. 1160(c)(5) and (g) 36
Sec. 1160(d) 36
Sec. 1251 5
Sec. 1251(a)(1) 36
Sec. 1281(g) 38
Sec. 1281(g)(2(A) 37
Sec. 1281(h) 38
Sec. 1281(d)(4) 42
Sec. 1281(j) 38
Sec. 1297 ..... 2, 39
Sec. 1311(b) 37
Sec. 1311(b)(1)(B) 37
Sec. 1311(b)(2)(B) 37
Sec. 1314(d)(1) 37
Sec. 1312(a) 37
Sec. 1312(b) 37
Sec. 1313(a) 37
Sec. 1313(c) 37
Sec. 1313(d) 37
Sec. 1313(e) 37
Sec. 1319(a) 38
Sec. 1319(a)(1) 38
Sec. 1913(b) 38
Sec. 1319(c) 38

PAGE

33 U.S.C. (Clean Water Act of 1977) (Federal Water Pollution Control Act, as amended) (Supp. I):

Sec. 1319(d) 17, 38
Sec. 1342 ..... 4, 37
Sec. 1342(a)(1) 38
Sec. 1342(3)(3)-(d)(5) 38
Sec. 1362(14) 37
Sec. 1365(a) 16, 17
Sec. 1365(a)(1) 15
Sec. 1365(e) 8, 12, 13, 15
Sec. 1365(g) 16
Sec. 1370 37
Sec. 1401(b) 40
Sec. 1411 40
Sec. 1412 ..... 40, 41
Sec. 1412(a) 41
Sec. 1412a 4
Sec. 1412a.(b) 4
Sec. 1412(c) 41
Sec. 1413 40
Sec. 1415 42
Sec. 1416(d) 42
Sec. 1418 40
Sec. 1441 et seq. 42

PAGE

33 U.S.C. (Marine Protection Research and Sanctuaries Act, 1972) (Supp. I):

Sec. 505 14
Sec. 505(a) 17
Sec. 1365 ..... 12, 17, 18
Sec. 1365(e) 12, 13
Sec. 1401 5
Sec. 1415(g)(5) 8, 12, 41, 42

33 U.S.C. (Refuse Act):

Sec. 407 5

42 U.S.C. (Clean Air Act):

Sec. 7604 ..... 13, 14
Sec. 7604(e) 32

42 U.S.C. (Noise Control Act of 1972):

Sec. 4911(e) 32

42 U.S.C. (Safe Drinking Water Act) (Supp. II):

Sec. 300(j)-8(e) 32

Supreme Court Rule Cited

Rule 20.1 1

PAGE

Legislative Reports Cited

S. Rep. No. 92-451 1972, U.S. Code & Adm. News, 4234, 4257 ..... 41, 43

S. Rep. No. 414, Reported in 1972, U.S. Code Cong. & Adm. News 3668, 3746 ..... 13, 39

S. Rep. No. 1301, Reported in 1972 U.S. Code Cong. & Adm. News 4232, 4250 13

S. Rep. No. 91-1196 (1970) 13

S. Rep. 1972, U.S. Code Cong. & Adm. News p. 3745 40

S. Rep. 1972, U.S. Code Cong. & Adm. News p. 3758 39

Other Authorities Cited

Friendly, "In Praise of Erie—And Of The New Federal Common Law" 39 N.Y. Univ. L.Rev. 383 passim (1964) 29

I Grad "Treatise on Environmental Law" (1979), §3.08, p. 3-180 ..... 24, 25

Hart & Wechsler's "The Federal Courts and The Federal System" (1973, 2d ed. Bator, Mishkin, Shapiro and Wechsler) p. 806 ..... 23, 26

Note, "Federal Common Law and Interstate Pollution", 85 Harv. L. Rev. 1439, 1451-1452 (1972) 25, 26

Krier, "Environmental Law and Policy 208-232 (1971) 28

Restatement of Torts, Second (1977):

Sec. 821(B) 29

Sec. 826 29

PAGE

Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy", 86 Yale L.J. 1196 (1977) 28

USEPA, "Environmental Impact Statement on the Ocean Dumping of Sewage in the New York Bight" (Final Statement, September 1978), p. 17 ("EIS") 5, 6

Wright, "The Federal Courts and The Nature and Quality of State Law", 13 Wayne L.Rev. 317 (1967) 27

Zener, "The Federal Law of Water Pollution Control" in E. Dolgin & T. Guilbert, "Federal Environmental Law" 788 (1974) 27

List of Parties

All parties are set forth in the caption of the cause set forth on the cover of the petition for certiorari of Middlesex County sewerage Authority, et al. (No. 79-1711).

Opinions and Judgments Below

The opinion of the Court of Appeals for the Third Circuit, filed February 5, 1980, is reported at 616 *F.2d* 1222. The opinion of the District Court for the District of New Jersey is unreported officially but appears at 12 *E.R.C.* 1118.

The opinion and the judgment of the Court of Appeals appear in the appendix to the petition for certiorari of Middlesex County Sewerage Authority et al. at pp. 1a and 38a, respectively; and in the appendix to the petition for certiorari of Environmental Protection Agency et al. at pp. 1a and 32a, respectively.

The opinion and order of the District Court appear in the appendix to the petition for certiorari of Middlesex County Sewerage Authority et al. at pp. 40a and 68a respectively; and in the appendix to the petition for certiorari of Environmental Protection Agency et al. at pp. 35a and 60a, respectively.

Jurisdiction of Supreme Court

Jurisdiction of this Court is invoked by petition for certiorari pursuant to 28 *U.S.C.* §1254(1) on grounds of error in the judgment of the Court of Appeals warranting review by this Court. Certiorari was required to be sought within 60 days after entry of judgment. Rule 20.1.

Constitutional Provisions, Statutes and Regulations

No constitutional provisions are involved herein. The statutes involved in the case are voluminous. The pertinent provisions, except for one, are set forth in the appendix to the petition for certiorari of these petitioners (72a to 105a). The regulations of the United States Environmental Protection Agency incidentally involved are extremely voluminous. The text of any particular regulation is not pertinent to the issues herein. They are therefore not set forth.

Section 41 of the Clean Water Act of 1977 (Federal Water Pollution Control Act, as amended (Supp. I) (33 *U.S.C.* Supp. I §1297), omitted from petitioners' appendix, is as follows:

> "§ 1297. Any guidelines for cost-effectiveness analysis published be the Administrator under this subchapter shall provide for the identification and selection of cost effective alternatives to comply with the objective and goals of this chapter and sections 1281(b), 1281(d), 1281(g)(2)(A), and 1311 (b)(2)(B) of this title."

Statement of the Case

The petition for certiorari in No. 79-1711 was filed by five of the six New Jersey public sewerage disposal agencies made defendants in the action instituted in the District Court. Three of them are represented by this brief. The petition sought review of a judgment of the United States Court of Appeals for the Third Circuit which reversed a judgment of the United States District Court for the District of New Jersey (Honorable H. Curtis Meanor) which dismissed on grounds either of absence of jurisdiction or failure to state a claim upon which relief can be granted the complaint of the plaintiffs seeking both injunctive relief and damages against numerous federal, New York and New Jersey state officials and agencies con-

cerned either with the public disposition of sewage or the administrative regulation of the activities of such agencies. Some of the defendant sewage disposal agencies, including these petitioners, are constituted under New Jersey state authority, others under New York.

The substance of the complaint, set forth in eleven counts, is that defendants by acts of commission or omission have caused or permitted the pollution of the Atlantic Ocean resulting in such damage to the marine environment as to have adversely affected plaintiffs' commercial business of fishing, clamming and lobstering on the shores or in the waters of the ocean. (J.A.18a *et seq.*).

Petitioners are public instrumentalities of New Jersey created under and pursuant to *N.J.S.A.* 40:14A-1 *et seq.*, 40:14B-1 *et seq.* or 58:14-1 et seq.. Petitioner Middlesex County Sewerage Authority* (MCSA) is generally typical of the other New Jersey petitioners in scope of activity, some of them being smaller and others larger. MCSA is responsible for the sewage disposal of 28 municipalities in and adjacent to Middlesex County and a number of large industries. The population it serves is approximately 600,000. Its capital investment is about $250,000,000 and its operating budget for 1980 is $14,874,000. Its operating expenses are met by local taxes and sewer connection fees charged member municipalities and industrial users. Several of petitioners are undergoing a capital expansion program mandated by state and federal environmental authorities and substantially financed by federal grants pursuant to the Federal Water Pollution Control Act (FWPCA) and the Marine Protection, Research and Sanctuaries Act (MPRSA). In the case of MCSA, the expenses of expansion and rising operating costs have almost doubled charges to users in the past year.

---

* Since filing the petition the name of this petitioner has been changed to Middlesex County Utilities Authority. The original name will be used herein.

Existing regulations of the United States Department of Environmental Protection ("EPA") and the 1977 amendment of MPRSA mandate cessation of ocean dumping of sewage sludge* by December 31, 1981. 33 *U.S.C.* §1412a.. Petitioners are in the course of active transition from ocean dumping to landbased alternatives for disposition of such sewage sludge under a schedule of interim permits issued by EPA for ocean dumping at a fixed location, and designed to effect such a shift by the stated termination date. Petitioners have held such permits at all times complained of by plaintiffs.

Petitioners are subject also to EPA permit control of their discharge of sewage effluent into various streams and the ocean under authority of FWPCA. MCSA holds a discharge permit from EPA issued October 31, 1974 under the National Pollutant Discharge Elimination System (NPDES) created under the 1972 amendment of FWPCA (33 *U.S.C.* §1342). It is believed the other New Jersey petitioners also hold such permits.

In the instant class action, plaintiffs seek not only judicial abatement of ocean dumping of sewage sludge by petitioners, thereby disrupting the measured progress toward that end now being effected administratively under Congressional mandate, direction and financial support, but also demand, on behalf of members of the affected class, compensatory damages of $250,000,000 and punitive damages of $250,000,000 from defendants.

Since 1924 municipal sewerage authorities in New York and New Jersey have dumped sewage sludge at a dump site in the Atlantic Ocean approximately 12 miles east of Long Branch, New Jersey (the New York Bight). The Army

---

* Defined in the act as such "waste generated by a municipal wastewater treatment plant the ocean dumping of which may *unreasonably* degrade or endanger human health, welfare, amenities or the marine environment, ecological systems, or economic potentialities" (emphasis added). §1412a.(b).

Corps of Engineers has dumped dredged materials at a nearby site. See USEPA, "Environmental Impact Statement on the Ocean Dumping of Sewage in the New York Bight" (Final Statement, September 1978, p. 17 ("EIS"). Ocean dumping of wastes began to be regulated federally in 1899, Refuse Act, 33 *U.S.C.* §407, and other earlier versions of FWPCA, *i.e.* Act of June 30, 1948, c. 758. Federal regulation of ocean dumping of sludge and discharge of sewage effluent was vastly expanded during the last decade by the 1972 and 1977 amendments of FWPCA, the adoption in 1972 of the MPRSA and the 1977 amendment of that act.

Under the Refuse Act, the Army Corps of Engineers was authorized to grant ocean dumping permits. But under the more recent FPWCA and MPRSA legislation the permit-issuing authority was transferred to EPA, and specific criteria for the issuance of permits were established administratively. 33 *U.S.C.* §1251 *et seq.*, 33 *U.S.C.* §1401 *et seq.*, 40 *C.F.R.* Parts 220 to 229.

In 1974 EPA undertook a study to determine whether the sewage dumping site in the New York Bight should be relocated. EIS, *supra*, p. 1. A draft Environmental Impact Statement was issued in early 1976.

In the summer of 1976 there was a fish kill off the New Jersey coast which constitutes the gravamen of the complaint herein. The fish kill was the subject of comprehensive federal, state and local investigations which concluded that ocean dumping of sewage sludge was only a minor contributing factor. EIS, *supra*, pp. 54-61. That isolated phenomenon led EPA to make further studies on the ocean dumping situation, resulting in a new EIS in 1978. That reached the conclusion that under all the attendant circumstances the most advisable course of action was for the continuance of ocean dumping of sewage sludge at the present site but with encouragement for the construction of improved sewage treatment plants to minimize marine

damage. EIS, *supra*, pp. 62-82, 203-207. Several of the New Jersey petitioners have recently substantially improved their sewage treatment processes. All are of least secondary treatment quality.

Insofar as concerns these petitioners, the disposition of the issues presented on defendants' motions to dismiss by the lower courts was as follows.

As to the claims asserted under FWPCA and MPRSA, the District Court held that the claims must be dismissed because of failure of timely service of notice on the defendants prior to institution of the action, as required by the respective statutes (pet. cert. app. 56a). On this issue the Court of Appeals reversed, holding that absence of notice was not fatal because of the "savings clause" of the citizens action provisions of the statutes which preserve any existing right of action under any statute or common law (pet. cert. app. 10a). As to plaintiffs' contention that, independent of any right of action under the express citizens' suit provisions of FWPCA and MPRSA, they could maintain the suit pursuant to (a) an implied right of action under those statutes and (b) the theory of federal common-law nuisance, relying primarily on *Illinois* v. *City of Milwaukee*, 406 *U.S.* 91 (1972), the District Court held that there was no implied action, that the federal nuisance remedy was available only in favor of states, not private parties, and that the notice provisions of the statutes remained applicable to any actions brought under the "savings clause." (pet. cert. app. 47a). The Court of Appeals reversed these determinations, holding that a private federal common-law nuisance claim was available under the *Illinois* case and an implied claim under FWPCA and MPRSA as well, free of the notice requirement (pet. cert. app. 28a-29a, 6a-14a).

As concerns plaintiffs' reliance upon admiralty and maritime jurisdiction of the federal courts, the District Court held that there was a failure to plead a cause of action

cognizable under such jurisdiction. The court alternatively held that even if the complaint was read to encompass a substantive claim under such jurisdiction, it would have to be dismissed for failure of compliance with the notice requirements of state tort claims statutes (excepting the case of New York City). (pet. cert. app. 62a, 63a). The Court of Appeals held that a more liberal reading of the complaint was required at the pleading stage and that the asserted cause of action was viable although essentially identical with the federal common-law tort nuisance claim. (pet. cert. app. 29a-31a).

Petitioners sought on appeal to sustain the judgment of the District Court, insofar as the complaint demands money damages, on grounds of sovereign immunity under the Eleventh Amendment. The Court of Appeals summarily rejected the sovereign immunity defense; citing no cases but only *N.J.S.A.* 40:14B-4 and *N.J.S.A.* 58:14-2 and noting that the defendants were municipal corporations (pet. cert. app. 36a). The defense of the Eleventh Amendment is excluded from consideration herein under the questions framed in the grant of certiorari.

Four petitions for certiorari were filed, one including the petitioners represented by this brief. All were granted by Order of this Court dated October 20, 1980 (J.A. 48a). The questions were ordered limited to those set forth first hereinabove. *Ibid.*

Summary of Argument

1. Neither FWPCA nor MPRSA imply a private right of action independent of the citizens suit provisions of those statutes. The four critical factors for implying a private cause of action from a regulatory statute set forth in *Cort* v. *Ash,* 422 U.S. 66 (1975), have been substantially diluted by the more recent formulation in *Touche Ross & Co.* v. *Redington,* 442 *U.S.* 560 (1979) and *Transamerica*

Mortgage Advisors v. *Lewis,* 444 *U.S.* 11 (1979). The four *Cort* factors do not have equal weight. *Touche Ross,* at 575, "The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action". *Ibid.* Substantial weight is to be accorded the circumstance that the statute in question expressly provides for a private cause of action. *Id.* at 574. This analysis is pertinent to the present case since both of the statutes involved provide expressly for citizens suits thereunder, within stated limitations as to notice and otherwise.

Reliance by the Court of Appeals on the language in the "savings clause" of FWPCA, 33 *U.S.C.* §1365(e), which states that nothing in the section "shall restrict any right which any person * * * may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief * * *" and on the similar provision of MPRSA, 33 *U.S.C.* §1415(g)(5), is mistaken. The allusion to "any statute" does not include FWPCA (or MPRSA) itself. The legislative history indicates that the intent of the reference is to any other statute.

Implication of a private remedy for damages under either Section 1365(e) of FWPCA or Secion 1415(g)(5) of MPRSA would be inconsistent with the Congressional purpose implicit in both acts of encouraging private participation in the enforcement thereof but only within the channels expressly provided (especially prior notice), and would thereby contravene the third factor identified in *Cort* v. *Ash, supra,* namely: is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?" (422 *U.S.* at 78). This court stated in *Touche Ross, supra,* that it was "extremely reluctant to imply a cause of action in [the statute] that is significantly broader than the remedy that Congress chose to provide". (442 *U.S.* at 574).

2. To the extent that a federal common-law nuisance action may at all survive the now asserted preemptive effect of FWPCA and MPRSA, as currently amended, in relation to suits for ocean pollution against publicly owned sewerage works, it should be held that a private citizen may not maintain such an action.

The predominant rationale of the opinion in *Illinois* v. *Milwaukee,* 406 *U.S.* 91 (1972), establishing a federal common-law nuisance action for interstate water pollution at the behest of states, was the need to afford states legal protection in federal courts against pollution emanating from beyond the state's borders—protection required by the inability of states in this federal union otherwise to be relieved from such harm. Indirectly involved, also, was the constitutional original jurisdiction of the Supreme Court to entertain actions by states against citizens of other states invoked by the plaintiff in that case, and the pragmatic desire of the Court to minimize involvement in original actions. This conduced to establishing remedial jurisdiction therefor in the district court. These considerations are not pertinent to private citizens aggrieved by interstate nuisances involving water pollution. They are free to bring such actions in state courts. Current notions of due process under minimum-contacts rules would permit nuisance actions against foreign sources of local water pollution in local state courts. Consequently, considering also the availability of citizens suits under the regulatory statutes, private citizens have adequate recourse to relief without encumbering overburdened federal district courts with nuisance suits.

The best scholarship in environmental law is in agreement that because of its *ad hoc* nature the common-law nuisance action does not contribute functionally to a sound system for control and regulation of environmental pollution and that comprehensive legislative and administrative regulation is better suited to that end.

Elimination of privately brought nuisance actions in federal courts would be consistent with such views. Moreover, the same considerations which will be advanced hereinafter militating for a doctrine of partial preemption of federal nuisance remedies in the water pollution field by the comprehensive federal regulatory machinery now in place also support, *a fortiori,* superseding citizens nuisance actions for ocean pollution against publicly owned sewerage disposal agencies.

3. The prediction in *Illinois* v. *Milwaukee* that a time might come when the statutory and regulatory mechanism for control of water pollution would be so comprehensive as to warrant preemption of a federal common-law nuisance cause of action is now fulfilled. When *Illinois* was decided, the 1972 and 1977 amendments of FWPCA had not yet come into effect nor had Congress yet enacted MPRSA. The latter statute (amended in 1977) is here particularly significant in that the gravamen of the present action against the New Jersey and New York sewerage agencies is the dumping of sewage sludge in the New York Bight.

The present scope of these statutes and of the extent and effect of the administrative regulations adopted by EPA pursuant thereto effectively subjects petitioners and industrial water dischargers to the closest and most detailed scrutiny and oversight readily conceivable. Moreover, in respect of petitioner public sewerage agencies, Congress has appropriated massive federal funds for the planning and construction of improved sewerage treatment facilities and for land-based alternatives to ocean dumping of sewage sludge.

By the resulting establishment of the partnership between federal, state and local agencies involved in the comprehensive program of reduction and eventual elimination of pollution of the ocean, Congress has clearly manifested an intent against the continued availability of common-law nuisance actions in federal courts against public sewerage

agencies so controlled and regulated. The maintenance thereof, particularly in respect of damage suits, would conflict with and obstruct and impede the efficient execution of the federally managed and financed programs for ultimate cessation of ocean pollution by such agencies at the earliest feasible date.

Subjection of public sewerage agencies to the hazard of common-law nuisance suits, wherein no predictable judgment as to the responsibility of the agencies would be available in advance, would conflict and be inconsistent with the evident Congressional purpose of informing such agencies what standards of pollution prevention were expected of them and the dates by which such specific goals were to be reached. Moreover, the subjection of such agencies to the possibility of substantial verdicts for money damages would cripple and impede them, unduly penalize the participating public and would be at cross-purposes with the massive infusion of federal money into the federally mandated programs for solution of the water pollution problem.

As noted above, the comprehensive and uniform federal regulation of water pollution now in place is vastly preferable to the *ad hoc* remedy of judicial attention to isolated pollution situations in the context of tort litigation.

For these reasons, it should now be concluded that Congress intends the preemption of the federal common-law nuisance remedy, in respect of sewage sludge dumping and discharge of sewage effluent by publicly owned sewage agencies operating under federal regulation, by the scheme of the existing comprehensive federally legislated program of control of ocean pollution.

ARGUMENT

POINT I

Neither the FWPCA, as amended, nor the MPRSA, as amended, imply a private right of action under those statutes independent of the citizens suit provisions thereof.

The Court of Appeals held that both the FWPCA and the MPRSA implied a private cause of action for violation by any person or agency of the regulatory provisions of those statutes. Reliance was had upon 33 *U.S.C.* §1365 (e) of FWPCA and upon the similarly worded provision in MPRSA (33 *U.S.C.* §1415(g)(5).

So far as here pertinent, 33 *U.S.C.* §1365 provides in substance: Any citizen may commence a civil action against any person or governmental agency alleged to be in violation of an effluent standard or limitation under the law or an order by the EPA administrator or a state concerning such a standard or against the administrator if charged with failure to perform a non-discretionary duty. The district court is given jurisdiction in such cases without regard to citizenship or amount in controversy and may apply any civil penalties provided by the law. No citizens action may be commenced prior to 60 days after plaintiff has given notice of the violation to the Administrator, to the state where the violation occurs and to any alleged violator, nor may such action be instituted if the administrator or the state has commenced and is diligently prosecuting a civil or criminal action to require compliance with the standard or order. If the action is brought against the administrator, 60 days prior notice must be given to him.

The Section concludes as follows:

> "(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforce-

> ment of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."

The Court of Appeals was impelled to the stated conclusion as one of its two bases for sustaining jurisdiction in the absence of compliance by plaintiffs with the sixty day notice provisions of these statutes. In effect, the court read the allusion to "any statute" in subparagraph (e) of Section 1365 to include the subject statute itself. The clear sense of the language employed, however, is that "any statute" means any statute other than FWPCA itself. Indeed, the 1972 Senate report on the FWPCA bill explained, in reference to the savings clause:

> "It should be noted * * * that the section would specifically preserve any rights or remedies under *any other law.*" (emphasis supplied)
>
> S. Rep. No. 414, Reported in 1972, *U.S. Code Cong. & Adm. News* 3668, 3746.

Substantially the same reasoning is contained in the Senate report on the MPRSA bill. S. Rep. No. 1301, Reported in 1972, *U.S. Code Cong. & Adm. News* 4232, 4250.*

The Court of Appeals alluded to the cited FWPCA history but dismissed it with the conclusional observation that the court was "not persuaded that this paraphrase of the wording of the Act was intended to preclude the finding of a private remedy under the Act." (pet. cert. app. 16a). One wonders, why not? The act obviously fashions a specific citizens remedy and at the same time seeks to preserve any private remedies which may exist under any other act or common law. What sensible basis remains for implying yet another remedy under the act itself?

---

* Identical reasoning is contained in the Senate report on the Savings Clause of the Clean Air Act, 42 *U.S.C.* §7604, upon which the savings clause in FWPCA was modeled. S. Rep. No. 91-1196 (1970).

It does not appear that any other court of appeals is in agreement with the holding of the Third Circuit in this case. The best reasoned decision on the point is that of the Seventh Circuit Court of Appeals in *City of Evansville, Ind.* v. *Ky. Liquid Recycling,* 604 *F.2d* 1008 (7 Cir. 1979). After alluding to the legislative history cited above, the court noted that the rejection by Congress of all but two of the proposed exceptions to the requirement of a sixty day waiting period for a citizens suit (alluding to the legislative history as set forth in footnote 16 of the opinion) "reinforces the evidence in §505 [Section 1365] itself of an intent to circumscribe private rights of action under the FWPCA" (604 *F.2d* at 1015). The court noted that its discussion of Section 505 as precluding a private remedy was also consistent with the third factor identified in *Cort* v. *Ash,** 422 *U.S.* 66, 78 (1975), as a criterion for judicial implication of Congressional intent to create a private cause of action, namely, "is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?" 604 *F.2d* at 1015.

The same court had rendered a comparable decision in reference to the similar savings clause of the Clean Air Amendments of 1970 (42 *U.S.C.* §7604). *City of Highland Park* v. *Train,* 519 *F.2d* 681 (7 Cir. 1975), cert. den. 424 *U.S.* 927 (1976). The court there held the failure to give the required statutory notice to be fatal to the action. It pointed out that although there was clear indication by express proviso of intent to allow citizen participation in the enforcement of the act, the legislative history also demonstrated:

---

* The other criteria mentioned in *Cort are*: (a) whether plaintiff is one of the class for whose *especial* benefit the statute was enacted; (b) indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; (d) is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on Federal Law. (emphasis in original opinion). 422 *U.S.* at 78.

> "that Congress intended to provide for citizens' suits in a manner that would be least likely to clog already burdened federal courts and most likely to trigger governmental action which would alleviate any need for judicial relief. It was in response to these concerns that the statutory notice provisions were included in section 304. Congress's intention would be frustrated if the statutory mandate of section 304(b) were ignored." (footnotes omitted). 519 *F.2d* at 690-691.

While there appear to be no prior federal appellate rulings expressly to the contrary of the position of the Seventh Circuit, several cases have allowed actions against EPA or other federal governmental administrators without prior notice in purported pursuance of FWPCA *via* the putative jurisdictional avenue of the Administrative Procedure Act* and 28 *U.S.C.* §1331, thereby circumventing the notice provisions of the statutes. *Conservation Soc. of S. Ver. Inc.* v. *Secretary of Tran.*, 508 *F.2d* 927 (2 Cir. 1974); *Natural Resources Defense Council* v. *Callaway*, 524 *F.2d* 79 (2 Cir. 1975); *Natural Resources Defense Council Inc.* v. *Train*, 510 *F.2d* 692 (D.C. Cir. 1975).

None of the cases cited expressly finds an implied cause of action under the statute involved. As noted in *City of Highland Park* v. *Train, supra,* (519 *F.2d* at 693), the rationale in each of those decisions for invoking 28 *U.S.C.* §1331(a) is obscure.

To buttress its contention of a general private cause of action under FWPCA, the Court of Appeals below labors to establish a rationale of entitlement to an action by *non-injured* citizens under §1365(a)(1) and of a companion species of action by *injured* citizens under paragraph (e) of the section. It bases the distinction upon legislative

---

* The rationale of Section 10 of the Administrative Procedure Act as an independent basis for jurisdiction in the federal courts to review actions of federal officials was undermined by the contrary holding in *Califano* v. *Sanders*, 430 *U.S.* 99 (1977).

history supposedly designed to meet the decision of this court in *Sierra Club* v. *Morton,* 405 *U.S.* 727 (1972) (pet. cert. app. 7a). But the thesis does not withstand scrutiny of the statutory language. Concededly *Sierra Club* held that review of federal agency action by parties who could not show injury was not available under the Administrative Procedure Act. However, the definition in §1365 (g) of a "citizen" who is permitted to institute a civil action under paragraph (a) is "a person or persons having an interest which is or may be adversely affected." That definition tracks the *Sierra Club* language concerning injured persons (the suitor must show "that he is himself adversely affected") (405 *U.S.* at 740). It is thus clear that section (a) actions may be brought only by injured persons, contrary to the thesis of the Court of Appeals, and the supposed distinction advanced to support its holding that there is a private action independent of paragraph (a) does not stand up.

The criteria of *Cort* v. *Ash, supra,* particularly as qualified by *Touche Ross & Co.* v. *Redington,* and *Transamerica Mortgage Advisors* v. *Lewis,* both *supra,* do not justify implication of an independent federal cause of action. At best, the factors require a balanced approach and are not all of equal weight. *Touche Ross,* 442 *U.S.* at 575. The most important of them is the second, *i.e.* any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one. *Touche Ross, supra, Ibid.* "[t]he central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action". *Ibid.* The court in *Touche Ross* found signal justification for refusing to find the implication of a private remedy under one section of the act there involved because other sections of the statute "expressly provide a private right of action" (442 *U.S.* at 571-572). The court went on to say:

> "Obviously, then, when Congress wished to provide a private damages remedy, it knew how to do so

and did so expressly" (*Id.* at 572) citations omitted).

The court said, further:

> "* * * Where the prinicpal express civil remedy for misstatements in reports created by Congress contemporaneously with the passage of Section 17a is by its terms limited to purchasers and sellers of securities, we are extremely reluctant to imply a cause of action in Section 17a that is significantly broader than the remedy that Congress chose to provide." (*Id.* at 574) (citations omitted).

To the same effect see *Cannon* v. *University of Chicago,* 441 *U.S.* 677, 718 (1979).

So, too, as to Section 1365. Section 1365 expressly permits citizens to bring civil actions against any person alleged to be in violation of an effluent standard or limitation or of an order issued by the administrator or a state with respect to such standard or limitation and to request the court to apply any appropriate civil penalties under Section 1319(d) of the Act—penalties which can amount to $10,000 per day of any violation. There is no basis to imply Congressional intent to permit the assessment of damages in excess of that figure in common-law tort actions under the act at the instance of private parties. There is particularly no evidence of any intent to permit evasion of the statutory notice requirement through the escape hatch of such common-law tort actions, see *City of Evansville, Ind.* v. *Ky. Liquid Recycling, supra,* (604 *F.2d* at 1014), where it is pointed out that the Senate committee report in reference to Section 505(a) of the act (Section 1365(a)) makes clear that it did not contemplate class actions or actions for damages.

The analysis in *City of Evansville* gains added cogency from the recent decision of this court in *Transamerica Mortgage Advisors* v. *Lewis, supra.* There, too, the court rejected a claim for implication of a private cause of action for damages under a regulatory statute, pointing out,

as did the *City of Evansville* court, that "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it" (62 *L.ed. 2d* 146, 154-155). The court thus declined to find an implied private damage action under the statute, the legislation having provided several express remedies for the evils sought to be overcome. As in *Touche Ross, supra,* the court downgraded the four criteria of *Cort* v. *Ash, supra.* It specifically minimized the criteria (a) as to the intent of the statute to protect certain categories of persons and (b) that the claimed private remedy may be one not traditionally relegated to state law, as not determinative of the issue. It reiterated the controlling influence of Congressional intent, as stressed in *Touche Ross.*

Applying the teaching of *Touche Ross* and *Transamerica Mortgage Advisors,* we find in the statutes under scrutiny that they explicitly provide certain remedies for citizens and that they save such *other* remedies as may exist either by statute or common law in favor of any person. In combination, this evidence overwhelmingly negates any intent to create a private remedy under FWPCA or MPRSA themselves.*

---

* Striking additional evidence of Congressional intent not to create a private remedy under the 1972 amendments of FWPCA or by MPRSA is afforded by the fact that practically simultaneously with the passage and adoption of those statutes the 92nd Congress also considered and passed the Consumer Product Safety Act (15 *U.S.C.* §2051, *et seq.*). Section 24 of that act (15 *U.S.C.* §2073) contains a provision for citizen suits to enforce consumer safety product rules similar to 33 *U.S.C.* §1365. However, the act *also includes* an express provision for a private damage remedy (15 *U.S.C.* §2072). The comparative treatment of express provisions for private citizens actions in these contemporaneously adopted enactments lends added point to the observations in *Touche Ross* and *Transamerica Mortgage* that when Congress intends to provide a private damages remedy in a regulatory statute it can be expected to do so expressly.

POINT II

The jurisdiction of federal courts under 28 *U.S.C.* §1331 to entertain federal common-law nuisance actions brought on behalf of plaintiff states for alleged damages from ocean pollution does not extend to private citizen plaintiffs.

The significance of this point heading is that the Court of Appeals held that, independent of the regulatory statutes here in question, the plaintiffs' cause of action could be maintained in the district court under its 28 *U.S.C.* §1331 jurisdiction as a federal common-law nuisance action. Reliance was placed upon the decision of this Court in *Illinois* v. *Milwaukee, supra.* We propose to argue that considerations both of law and public policy bespeak preclusion of availability of such a remedy to private party plaintiffs; either generally, or at least in relation to actions against publicly-owned sewerage agencies operating under regulatory permits issued pursuant to FWPCA or MPRSA.

1. *Illinois* v. *Milwaukee* envisaged only suits at the instance of states or state agencies.

The *Illinois* case began as a bill of complaint by the State of Illinois invoking the original jurisdiction of the Supreme Court to abate pollution emanating from a sewerage agency in Wisconsin and reaching the shores of Illinois on Lake Michigan, an interstate waterway. The Supreme Court rejected original jurisdiction but found adequate jurisdiction in the district courts under 28 *U.S.C.* §1331 on the hypothesis that the complaint stated a cause of action for federal common-law nuisance.

While the opinion in *Illinois* draws the contours of federal jurisdiction in relation to interstate waters with a broad brush, the predominant rationale is the need of

states for protection in presumably neutral federal courts from pollution emanating from another state whose courts might be hostile to an action on behalf of the injured state. *Illinois* cited as the leading case in the comparable area of air pollution *Georgia* v. *Tennessee Copper Co.*, 206 *U.S.* 230 (1907), where, in sustaining the action by Georgia against a Tennessee company whose noxious gases were causing widespread destruction in Georgia, the Court said:

> "* * * It is plain that some such demands must be recognized, if the grounds alleged are proved. When the States by their union made the forceable abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possiblity of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court. *Missouri* v. *Illinois*, 180 *U.S.* 208, 241." (206 *U.S.* at 237).

Almost all the precedents cited by the court in *Illinois* were actions on behalf of states.* In *Texas* v. *Pankey*, 441 *F.2d* 236 (10 Cir. 1971), also relied upon by the court in *Illinois*, one finds perhaps the first distinct articulation of a federal common-law nuisance theory in respect of actions by states for abatement of interstate pollution. Yet *Pankey* also focused on the justification for assuming such a cause of action in the historical conditions under which the several states entered the union. Citing *Georgia* v. *Tennessee Copper Co., supra*, the court said: "* * * the [Supreme] Court regarded a state's joinder in the Union and its commitment to the Constitution as having inherently insured

---

* The allusion in the opinion (406 *U.S.* at 105) to *Hinderlider* v. *La Plata R. and Cherry Creek D. Co.*, 304 *U.S.* 92 (1938), is not pertinent to the law of nuisance for interstate pollution damages. *Hinderlider* dealt with and was based upon the jurisdiction of the Supreme Court over the apportionment of water rights in an interstate stream as between states.

or guaranteed to it a right of protection by a federal court against improper pollution or impairment by outside sources of its appropriate environment and resource conditions" (441 *F.2d* at 240).

The almost unanimous view of the lower federal courts prior to the decision by the Court of Appeals in the instant case is in support of the position of the district court in the present case confining the federal common-law nuisance action to suits by states.* *Committee for Con. of Jones Falls Sewage System* v. *Train,* 375 *F.Supp.* 1148 (D. Md. 1974), affirmed on other grounds consistent with that of the district court on the instant issue, 539 *F.2d* 1006 (4 Cir. 1976) en banc); *Parsell* v. *Shell Oil Co.,* 421 *F.Supp.* 1275 (D. Conn. 1976), aff'd without opinion *sub nom. East End Yacht Club, Inc.* v. *Shell Oil Co.,* 573 *F.2d* 1289 (2 Cir. 1977); *Stream Pollution Bd. of Ind.* v. *U.S. Steel Corp.,* 512 *F.2d* 1036 (7 Cir. 1975) (private citizen denied intervention); *cf. Highland Park* v. *Train, supra,* (519 *F.2d* 681); but see *Byram River* v. *Village of Portchester,* 394 *F.Supp.* 618 (*S.D.N.Y.* 1975).

In *Committee for Con. of Jones Falls Sewage System* v. *Train, supra,* the court observed that the plaintiffs in the two principal cases cited in *Illinois* v. *Milwaukee* were states and that each of those cases "indicates that the character of the plaintiffs as governmental units was integral to the determination that a federal cause of action existed." 375 *F.Supp.* at 1153. Although affirming the determination of the district court in that case on other grounds, the Court of Appeals for the Fourth Circuit on appeal therefrom rendered its independent analysis of *Illinois* v. *Milwaukee* and *Texas* v. *Pankey* as developing "[o]f necessity * * * a body of federal common law for the reso-

---

* In *City of Evansville, Ind.* v. *Ky. Liquid Recycling, supra,* (604 *F.2d* at 1018) plaintiffs municipal corporations were held equivalent to the state for purposes of invoking *Illinois* v. *Milwaukee* relief.

lution of interstate pollution controversies when a state sought extra-territorial relief on behalf of her citizens." 539 *F.2d* at 1008. The court further observed that:

> "Perhaps with the exception of actions by the United States to abate public nuisances created in navigable waters by polluters, [citing cases] but consistent with §1251(b) [FWPCA] the doctrine of *Illinois* v. *Milwaukee* has not been extended beyond the abatement of public nuisance in interstate controversies where the complainant is a state and the offenders are creating extra-territorial harm." (f.n. omitted) (per Haynsworth, C.J.) 539 *F.2d* at 1009.

Similarly emphasizing the significance of the character of the plaintiff in *Illinois* v. *Milwaukee* and in the cases there relied upon is *Parsell* v. *Shell Oil Co., supra,* (421 *F.Supp.* at 1280-1281).

The Court of Appeals in the instant case lays stress (pet. cert. app. 25a) upon footnote 6 in *Illinois* v. *Milwaukee,* 406 *U.S.* at 105, to the effect that:

> "Thus, it is not only the character of the parties that requires us to apply federal law * * * [W]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law."

The implication of the Court of Appeals is that the footnote indicates that a state party plaintiff is not essential to the federal common-law nuisance action if the substantive federal question implicated is one calling for doctrinal uniformity. That thesis was refuted in *Committee for Con. of Jones Falls Sewerage System* v. *Train, supra,* (375 *F.Supp.* 1148), where the court, in dealing with the same *Illinois* footnote, said:

> "'it is not only the character of the parties that requires us to apply federal law.' This statement can be read in at least two different ways. It could

> mean a) that there were other considerations sufficient in themselves to require application of federal law, or b) that there were other federal interests which in addition to the character of the parties required the application of federal law although those other interests in themselves would not have been sufficient. In the view this Court takes of the basis for the Supreme Court's decision, the latter interpretation is the proper one." 375 *F.Supp.* at 1154-1155, n. 12.

We submit that the foregoing analysis should be accepted by this Court as a sound explanation of the mooted footnote in *Illinois*. If the *Illinois* Court had intended the newly announced federal common-law nuisance action to be available to private parties it is unlikely that the opinion would have failed so to state explicitly.*

Moreover, the policy considerations discussed hereinafter conduce to the argued-for result, whatever the intent of the Court in subscribing to the *Illinois* opinion in 1972.

2. *Illinois* v. *Milwaukee* authorized only a suit for abatement of nuisance, not an action for damages.

The decision of the Court of Appeals in this case not only extends the doctrine of *Illinois* v. *Milwaukee* to private claimants but also would enable them to recover damages against defendant public sewerage agencies. We submit that that consequence is particularly unwarranted from the substance of the *Illinois* decision. If, as we contend, the Court in *Illinois* was concerned only with *abatement*

---

* A leading work on the subject concludes that:

> "Justice Douglas' opinion casts no light on the question whether federal common-law governs suits to abate interstate pollution brought by private persons."

Hart & Wechsler's "The Federal Courts and The Federal System" (2d ed. 1973, Bator, Mishkin, Shapiro and Wechsler) p. 806.

of nuisances emanating from one state into another, it would follow that a private tort action for nuisance *damages* may not be subsumed under the *Illinois* v. *Milwaukee* umbrella.

In *Illinois,* abatement of the alleged nuisance was all that the complaint demanded (406 *U.S.* at 93). The patent rationale of the decision was the need of a state for federal relief of abatement of pollution coming from beyond its borders. In discussing the criteria for adjudication in such suits, the Court stated: "there are no fixed rules that govern; these be *equity* suits in which the informed judgment of the Chancellor will largely govern" (emphasis added) (406 *U.S.* at 107-108). Obviously damage suits were not in contemplation.

3. Policy considerations relative to the best interests of a national water pollution strategy argue for restriction of the federal nuisance action.

The argument we now make is pertinent not only to the point here under consideration but also to the matter of preemption of any federal common-law nuisance actions by the comprehensive regulatory mechanism created by FWPCA and MRPSA, argued hereinafter. The policy considerations which bespeak preclusion of the nuisance remedy in the water pollution area obviously militate at least for restriction of the remedy to actions by states, as proposed in the present point. We therefore develop the policy considerations at the present juncture.

There is practically unanimous agreement of the scholars in environmental law as to the inutility of the judicial approach to abtement of water pollution through common-law nuisance as contrasted with comprehensive statutory and regulatory machinery.

In his "Treatise On Environmental Law" (1979), which followed the adoption of the 1972 FWPCA amendments, Professor Grad of Columbia states:

> "The development of a federal common law of public nuisance—*limited, hopefully, to actions between states*—was probably a response to the inadequacies of past federal regulatory enactments in the air and water pollution control field. The law of nuisance has been far from clear in its application to modern water pollution and air pollution situations. It is in response to the inadequacies and lack of standards of the law of nuisance that much environmental regulatory legislation has been developed. The development of a federal common law of nuisance seems both unnecessary and unwarranted in the light of recent federal standards and federal enforcement sanctions provided under appropriate legislation. It may be useful to point out that the assertion of a federal law of nuisance in the Illinois v. City of Milwaukee case is clearly dictum. It is to be hoped that this peculiar and unnecessary departure from legislatively determined standards in the field will not see any further development. *Indeed, perhaps the time has already come that federal regulations 'pre-empt the field of federal common law of nuisance,'* as predicted by Mr. Justice Douglas." Vol. I, Grad, *supra* at § 3.03, p. 3-180 (emphasis added).

In a perceptive and widely cited Note written just prior to the decision in *Illinois* v. *Milwaukee,* and critical of *Texas* v. *Pankey, supra,* it was stated:

> "This denial [by rejection of *Texas* v. *Pankey*] of the power of the federal courts to fashion an environmental common law in state-nonresident cases does not entail the closing off of a source of substantive legal principles which might make any major contribution to the nation's efforts to address the environmental crisis. *Pankey* adds to lawmaking powers the federal courts already possess only a power to formulate broad standards of environmental conduct, a task courts are not well equipped to perform in environmental areas. Tasks courts are well equipped to perform in the environmental area—the definition of rights and liabilities to be created or imposed as consequences

> of compliance or noncompliance with statutorily or administratively established standards—may be undertaken by the federal courts through doctrines of judicial lawmaking power which were established long before *Pankey* and to which *Pankey* is irrelevant." Note, "Federal Common Law and Interstate Pollution", 85 *Harv. L.Rev.* 1439, 1451 (1972).*

The Note writer goes on to point out that the addition of federal common-law nuisance jurisdiction to the remedial apparatus relative to water pollution "is not especially significant to the effort to develop" appropriate "standards to impose on conduct affecting the environment". *Ibid.* The writer furnishes two reasons for the conclusions:

> "First, that task can be and is performed on the federal level by statutory provision and administrative process; recently-or soon-to-be-enacted federal legislation, for instance, provides for the promulgation of relatively comprehensive federal standards to govern industrial air and water pollution. Second, even when such standards are not provided by statute, the common law does not provide an adequate alternative context within which to develop such standards. Although various elements of tort law—nuisance law in particular, and, to lesser extents, certain elements of trespass and negligence law—formally provide a framework within which such standards could be evolved, case-by--case adjudication is fundamentally inadequate to consider and weigh properly the many and varied interests environmental standards must reflect and thus to contribute to the type of comprehensive planning necessary for environmental control." *Id.* at 1451-1452 (footnotes omitted).

---

* This note was described as "an intelligent analysis of the problems of creating a federal common law in the context of interstate pollution suits" in Hart & Wechsler's "The Federal Courts and The Federal System" (2d Ed. 1973, Bator, Mishkin, Shapiro & Wechsler) at 806.

Complementary to the foregoing observations is the case made by Robert Zener (formerly EPA counsel) against the utility of the common-law nuisance approach from the standpoint of the vital necessity of affording dischargers, public or private, notice of what standards the law requires them to meet. Zener, "The Federal Law of Water Pollution Control", in E. Dolgin & T. Guilbert, "Federal Environmental Law" (1974), 788. As Zener says:

> "The case-by-case balancing approach adopted by the Court in Illinois v. Milwaukee* imposes a severe constraint on the utility of the federal common law as a significant means of regulating water pollution. This approach means that until a federal court has issued an order directed to his own particular operation, *no discharger can be sure what the standard applicable to him will be.* All the discharger knows is that if he is sued under the federal common law, the court will balance the equities; but he cannot tell whether the balance will be struck at 75 percent removal, 90 percent removal, or some other figure. Only an administratively established standard can tell the discharger the precise level of control he must achieve. And most dischargers will not spend the substantial sums needed for pollution control equipment until they know the precise levels they must achieve under the law." *Id.* at 788 (emphasis added).

It is plain from all these observations that "poor old nuisance"** not only serves no functional value in the ap-

---

* "There are no fixed rules that govern; these will be equity suits in which the informed judgment of the Chancellor will largely govern". *Illinois* v. *City of Milwaukee, supra,* 406 *U.S.* at 107-108).

** "Poor old nuisance has been the common law's meager response to the crowdedness of society. The doctrine is pathetically inadequate to deal with the social realities of this half-century". Wright, "The Federal Courts and The Nature and Quality of State Law", 13 *Wayne L.Rev.* 317, 331 (1967).

proach to a rational body of water pollution abatement law, but is a detriment to its implementation.*

In "Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy", 86 *Yale L.J.* 1196 (1977), Professor Stewart of Harvard makes a strong case for federal enlistment of states in the regulatory mechanism for control of water pollution, particularly in relation to spillovers of pollution from one state to another. He anticipates possible constitutional challenge, and he urges the courts to reject such challenge, saying:

> "It is an invitation they should refuse. Because of political and administrative constraints, Congress must often deal with spillover problems in a generic fashion. A case-by-case judicial determination of whether federal statutory impositions on states were warranted in particular instances would, in effect, make the judge-made common law of interstate pollution superior to congressional statute. It would also loose the bonds of compromise that may have been politically indispensable for the enactment of such a statute in the first place. The resolution of substantial interstate conflicts should be left in the hands of the national forum in which all states are represented under the formula of the Great Compromise." *Id.* at 1230.

Whether or not this Court will agree with our argument for general preemption of federal tort suits against regulated public sewerage agencies, as presented in the next Point, restriction of the federal nuisance remedy against

---

* For abundant additional testimony against the utility of the judicial common-law approach in environmental law, see Krier, "Environmental Law and Policy" (1971) at 208-232.

use by private plaintiffs will at least tend to subserve the considerations noted by the foregoing authorities.*

There is no predictability about a judgment in a nuisance case. The *Restatement of Torts, Second* (1977), defines a public nuisance as "an unreasonable interference with a right common to the general public". Section 821B. Reasonableness is defined in terms of whether "the gravity of the harm outweighs the utility of the actor's conduct" or "the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible". *Id.*, Section 826. The unserviceability of such criteria, in relation to the potential liability of a public sewerage agency necessarily operating under statutes and regulations concerning water pollution as thoroughly considered as those here involved, is reflected by comment (f) to Section 821(B) of the Restatement (at p. 91):

> "* * * If there has been established a comprehensive set of legislative acts or administrative regulations governing the details of a particular kind of conduct, the courts are slow to declare an activity to be a public nuisance if it complies with the regulations".

We would take that comment one step further to suggest that the courts should bar an action to penalize as a public nuisance activities in the interest of the public's

---

* The approach suggested would be consistent with the fact that federal common-law of necessity evolves on a case-by-case basis, largely influenced by notions of policy. See Friendly, "In Praise of Erie—And Of The New Federal Common Law" 39 *N.Y. Univ. L.Rev.* 383, 405 *passim* (1964). The instances in which the Court since *Erie R. Co.* v. *Tompkins*, 304 *U.S.* 64 (1938), has created Federal common law "are few and restricted", *Wheeldin* v. *Wheeler*, 373 *U.S.* 647, 651 (1963). See also *Stone* v. *Powell*, 428 *U.S.* 465, (1976), where this Court deliberately restricted the *habeas corpus* federal jurisdiction to subserve a policy objective.

health, safety and convenience such as those being pursued by these petitioners under the statuory and regulatory mechanism now in place. See the further development of this viewpoint in the next Point of this brief.

Finally, it should be noted that preclusion of privately brought actions for water pollution in federal courts would not leave private citizens harmed by pollution originating in the waters of another state remediless. Under present rules of minimum contacts, jurisdiction over foreign polluters could be had in local state courts.

In summary, we submit that federal jurisdicstion should be closed to private actions under the rubric of nuisance for redress of water pollution attributable to EPA permittees, at least as to publicly owned sewerage agencies like these petitioners, functioning under federal regulatory supervision.*

---

* In *Wallis* v. *Pan American Petroleum Corp.*, 384 *U.S.* 63 (1966), it was held that federal common law should not be fashioned to supersede state law in a given area merely because there was latent federal power over the subject matter.

The court said:

> "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress * * *. Because we find no significant threat to any identifiable federal policy or interest we do not press on to consider other questions relevant to invoking federal common law * * *" (384 *U.S.* at 68).

Similarly, we here suggest that the mere latency of federal power over navigable or interstate waters raises no significant threat to any identifiable federal policy or interest in prohibiting private parties from suing public sewerage agencies for pollution damages in federal courts. The vaunted interest in uniformity of federal common law in this area is illusory since common-law nuisance judgments rendered by different judges on differing records, as clearly shown above, will not be uniform. Uniformity, within reasonable classifications, is found in the statutory regulatory system now governing ocean pollution.

POINT III

If a federal common-law nuisance action for ocean pollution is otherwise available to a private citizen, such an action should be held preempted by the present regulatory scheme in that area established by the FWPCA and the MPRSA.

We assume from the form of the third question listed by the Court in the order granting certiorari that the Court is not inviting reconsideration of the expression in *Illinois* v. *Milwaukee* that federal courts have common-law nuisance jurisdiction in actions brought by states for interstate water pollution.* We assume we are to argue only that preemption of such actions should apply when brought by a private citizen. The argument hereinafter proceeds upon that assumption.

Moreover, it is not our contention that no privately maintained tort action whatsover may be brought in a federal court against an ocean polluter but only that such actions are precluded if brought against any discharger functioning under a permit issued either under the authority of FWPCA or MPRSA. If a proposition of even that limited scope is not acceptable to the Court, we would argue that at the very least there should be preemption as respects suits against publicly owned waste treatment agencies, as we believe there is sufficient distinction between an industrial discharger and a public one to justify extending the preemptive effect of the regulatory statutes to the latter, if the Court will not accept preemption as to the

---

* Were we free to make the argument, we would contend that even such suits by states should be preempted as against defendant public sewerage agencies operating under EPA regulations, for the reasons hereinafter set forth. It has been suggested that such preemption "may have" occurred by reason of the 1972 amendments of FWPCA. *Com. of Mass.* v. *United States Veterans Admin.*, 541 *F.Supp.* 119, 121 (1 Cir. 1976).

former because it may be thought necessary to reserve the question of tort relief in specific industrial situations notwithstanding the regulatory statutes.

1. The "savings clauses" of FWPCA and MPRSA do not preclude a finding of preemption.

The initial contention which will be made against our position is that the savings clauses of both of the regulatory statutes in question implicitly militate against the concept of preemption. There are at least two broad responses to any such argument.

In the first place, these savings clauses are typical of those set forth in a number of other comparable regulatory statutes adopted by Congress during the initial stages of the development of a regulatory apparatus in respect of environmental or similar regulation. See for example the Toxic Substances Control Act, 15 *U.S.C.* §2619(c)(3) (Supp. I); the Safe Drinking Water Act, 42 *U.S.C.* §300(j)-8(e) (Supp. II); the Noise Control Act of 1972, 42 *U.S.C.* §4911 (e); and the Clean Air Amendments of 1970, 42 *U.S.C.* §7604(e) (Supp. II). The savings clauses of all of these statutes are closely comparable with those contained in FWPCA and MPRSA. The evident general Congressional policy was that in the light of the doubt as to whether conduct potentially actionable under other statutes or common law was sufficiently comprehensively addressed by the regulatory statute then being enacted, it was a wise precaution to save such other remedies as might exist and might be necessary to afford needed relief in specific situations not adequately dealt with by the remedial statutes.

However, regulatory statutes typically are expanded in scope and effectiveness as experience and research counsel, and the continued retention of the savings clauses in such statutes as a precautionary device should not militate inflexibly against a judicial inquiry as to whether at a given

point the statute has not become so comprehensive as to be deemed preemptive of any other remedial jurisdiction. So, too, here. We thus contend that the citizens remedy sections of FWPCA and MRPSA do not sensibly weigh against a judicial inquiry at this time as to whether a particular form of common-law remedy attempted to be asserted in the instant circumstances should not be held precluded by those statutes in their present comprehensive state. If the availability of a federal common-law nuisance action would constitute an "obstacle to accomplishment and execution of the full purposes and objectives of Congress", *Jones* v. *Roth Packing Co.,* 430 *U.S.* 519, 526 (1977), there should be preemption. So, too, upon a determination that such an action would conflict with the "implicit legislative design of the statute" or produce "general incompatibility with basic federal objectives", *Philadelphia* v. *New Jersey,* 437 *U.S.* 617, 620, n.4 (1978). Similarly, preemption might be justified because of the "pervasive nature of the scheme of federal regulation" involved. *Burbank* v. *Lockheed,* 411 *U.S.* 624, 633 (1973).

Our second response to any attempted refutation of preemption based upon the savings clauses of the statutes is that we contend only for a limited degree of preemption. Preliminarily, as already noted, we are not arguing for preemption of a federal action brought by a state for out-of-state originated pollution. Nor do we contend for preemption as to persons or corporations which are not functioning under permits issued by the regulatory agencies pursuant to the statutes here in question. Moreover, except to the extent that there is specific preclusion of actions against administrators, state or federal, under these statutes, we do not contend for preemption as against actions by aggrieved persons against such officials if there is any other federal jurisdictional and substantive basis for the maintenance thereof. *Cf. Califano* v. *Sanders, supra,* (430 *U.S.* 99).

2. The present scope of FWPCA and MPRSA justifies preemption of federal common-law nuisance actions against sewerage agencies which discharge effluent and dump sewerage sludge under permits pursuant to those statutes.

In *Illinois* v. *Milwaukee,* the court made the prescient observation that:

> "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution." 406 *U.S.* at 107."

When Illinois was decided, the 1972 and 1977 amendments of FWPCA had not yet come into effect nor had Congress enacted MPRSA. If the instant case involved only a complaint based upon discharge of effluent, we would contend that the substantially enlarged regulatory scheme promulgated by the 1972 and 1977 amendments of FWPCA justified a present determination of preemption of the common-law action as against sewerage agencies operating under EPA permit. However, the complaint herein, although including allegations of pollution through discharge of effluent, is obviously primarily based upon the dumping of sewage sludge by the defendant public sewerage agencies. It is consequently pertinent to inquire whether MPRSA, enacted after the *Illinois* case was decided, and designed to regulate and control the dumping of sewage sludge, among other ocean pollutants, does not, in combination with the scope and effect of FWPCA, preempt the maintenance of this action as a nuisance suit in a federal court. Our submission is that that inquiry should be answered in the affirmative.

(a) FWPCA is now of preemptive scope.

Even a brief comparison of the salient differences between the federal water pollution legislation as it stood prior to 1972 and the FWPCA under the amendments of 1972 and 1977 is convincing that the time for declaration of preemption of common-law nuisance actions, at least to the extent here argued for, has arrived.

Prior to 1972 the principal federal statutes concerning water pollution were 33 *U.S.C.* (1970 ed.) §1151 *et seq.* and Section 13 of the Rivers and Harbors Act of 1899, 33 *U.S.C.* § 407. Under the previous water pollution legislation the main pollution control mechanism consisted of the setting of ambient water quality standards, establishing permissible levels of pollution in interstate waters. 33 *U.S.C.* (1970 ed.) §1160(c). The states were given the primary responsibility for developing the water quality standards and were also called upon to devise plans for implementation consistent with statutory criteria. 33 *U.S.C.* (1970 ed.) §1160(c)(1), (c)(3). If a state either failed to establish a water quality standard or announced an inadequate one, EPA would be required to promulgate its own water quality standards in consultation with state authorities. 33 *U.S.C.* (1970 ed.) §1160(c). See *EPA* v. *Water Resources Control Board, supra* (426 *U.S.* 200, 202-203).

Under the original FWPCA it was the states which were assigned the first-instance responsibility for enforcing water standards. They were also permitted to establish enforcement procedures in respect of intrastate pollution. Provision was also made for a procedure for enforcement conferences among state and federal officials and other concerned persons if a discharge into interstate waters either reduced the quality thereof below established standards or was otherwise dangerous to the general health or welfare. 33 *U.S.C.* (1970 ed.) §1160(a),

(c)(5), and (d). If the dispute was not settled and the discharges continued six months after notice of a violation the United States was then authorized to institute action for abatement. 33 *U.S.C.* (1970 ed.) §1160(a), (c)(5), and (g).

The regulatory and enforcement procedures by the states were spotty and inconsistent. Under them, it was "very difficult to develop and enforce standards to govern the conduct of individual polluters." *EPA* v. *Water Resources Control Board, supra* (426 *U.S.* at 202-203). Consequently, EPA established a Refuse Act Permit Program ("RAPP") under the Rivers and Harbors act. That program prohibited the discharge of any substance into navigable waters without a federal permit. See *EPA* v. *State Water Resources Control Board, supra,* (426 *U.S.* at 203). This program, however, applied only to industrial dischargers; it did not govern the discharges of public sewage treatment systems.

The 1972 Amendments of FWPCA completely rewrote the statute, effected stricter standards for elimination of pollution of the nation's waters, tightened the enforcement procedures, brought EPA more directly into the regulatory process and created a more effective system for oversight by EPA of state enforcement rules and regulations.

The statute now declares that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985". 33 *U.S.C.* §1251(a)(1). Focusing on that objective, Congress expanded the EPA research demonstration and funding programs of the original statute and established a new system of standards and permits keyed to developing technological research and aimed at accomplishing effluent limitations on all point

sources* as well as achieving acceptable water quality standards. *EPA* v. *State Water Resources Control Board, supra,* 426 *U.S.* at 204.

The statute requires EPA to set stringent effluent limitations for municipal dischargers, among others. 33 *U.S.C.* §1311(b). Public sewerage works must institute secondary treatment by July 1, 1977. 33 *U.S.C.* §1311 (b)(1)(B), §1314(d)(1). By July 1, 1983 such agencies must achieve the "best practicable waste treatment technology over the life of the works". 33 *U.S.C.* §1311(b) (2)(B), §1281(g)(2)(A).

Each state is now directed to promulgate water quality standards governing all interstate and intrastate waters, under oversight by EPA, and to review such standards at least once every three years. 33 *U.S.C.* §1313(a),(c), (d),(e). The states are permitted to impose more stringent effluent limitations or other forms of pollution control than those set by EPA, subject to EPA approval. 33 *U.S.C.* §1370. The act specifies certain restrictions on EPA in terms of cost justification in setting forth effluent limitation standards. 33 *U.S.C.* §1312(a),(b).

Of particular significance in the present regard is the establishment by the revised legislation of the National Pollutant Discharge Elimination System ("NPDES") (33 *U.S.C.* §1342) which is designed "to transform generally applicable effluent limitations and other standards—including those based on water quality, into the obligations (including a timetable for compliance) of the original discharger". *EPA* v. *State Water Resources Control Board, supra,* 426 *U.S.* at 205. It is unlawful for any person to discharge pollutants into the interstate or navigable

---

* "Point source" means any "discernible, confined and discrete conveyance, including, but not limited to, any pipe, ditch, channel, conduit, well, ** or vessel or other floating craft, from which pollutants are or may be discharged**". *33 U.S.C.* §1362 (14).

waters without a NPDES permit. Such permits are issued by the EPA and by states where EPA has authorized a state agency to administer the NPDES program. The instant petitioners hold EPA NPDES permits.

Any interested party, including a state whose waters may be affected by the discharges in question, is entitled to notice and an opportunity for a hearing regarding the issuance of a permit. 33 *U.S.C.* §1342(a)(1), (b)(3)-(d)(5).

The revised FWPCA also strengthens the enforcement provisions of the statute. Criminal penalties are prescribed for willful or negligent violations of the act, 33 *U.S.C.* §1319(c), and EPA is authorized to bring civil enforcement actions for appropriate relief, including injunctions, and for specified civil penalties. 33 *U.S.C.* §1319(a),(b),(d). In certain circumstances states and adversely affected private persons may also bring enforcement actions. 33 *U.S.C.* §1319(a)(1).

A significant aspect of the revised legislation was the provision for massive infusion of federal grant funds to local sewerage agencies for construction and improvement of treatment plants and processes, for research and investigation of water pollution problems and in general for expediting the achievement of the statutory objectives by the targeted dates. See, illustratively, 33 *U.S.C.* §1281 (g),(h),(j).

The Senate Public Works Committee stressed the fiscal aspects of the program:

> "To assist states and localities, the bill proposes a four year program of Federal grants for construction of sewage treatment plants. The Federal matching funds total 14 billion dollars through fiscal year 1975.
>
> The minimum Federal grant is set at 60 percent of project costs. If a state contributes as much as 10 percent of project costs, the Federal grant

> is increased by a matching 10 percent. A locality's share thus becomes 20 percent of project costs." S. Rep. No. 92-414, 1972 *U.S. Code Cong. & Adm. News,* 3668, 3674.

Substantial additional federal appropriations have been made to support research and development, as well as administration.

By amendment in 1977 it was mandated that any guidelines for cost-effectiveness analysis promulgated by EPA must provide for selection of "cost effective alternatives" for many of the waste management improvement devices called for elsewhere in the statute. 33 *U.S.C.* §1297. Thus did Congress manifest new concern with the economics of pollution abatement.

Congress made evident its intent that local sewerage agencies could rely upon compliance with the statutes as meeting any liability for water pollution. The Senate report stated:

> "Water pollution control in the past has all too often been sporadic, inconsistent, and improvised on an ad hoc basis. The major purpose of this legislation is to establish a comprehensive long-range policy for the elimination of water pollution, making it clear to industry and municipalities alike the pollution control performance which will be expected over the next decade." S. Rep., 1972 *U.S. Code Cong. & Adm. News,* p. 3758.

In discussing the citizens suit provisions of the act, the Senate Committee sought to assure dischargers that they would have only objectively determinable standards to meet. The report stated:

> "Section 505 [1365] would not substitute a 'common law' or court-developed definition of water quality. An alleged violation of an effluent control limitation or standard would not require reanalysis of technological in [sic] other considerations at the enforcement stage. These matters will have been

> settled in the administrative procedure leading to the establishment of such effluent control provision. Therefore, an objective evidentiary standard will have to be met by any citizen who brings an action under this section." S. Rep. 1972 *U.S. Code Cong. & Adm. News* at p. 3745.

This expression is hardly compatible with a supposed legislative intent that dischargers, besides having to meet EPA standards, would *additionally* be in peril of whatever unpredictable standard a common-law judge deemed "reasonable" in a nuisance action.

(b) MPRSA is of preemptive scope.

MPRSA, adopted in 1972 after the *Illinois* decision, and amended in 1977, is fully as comprehensive in the area of ocean dumping as is FWPCA in that of water pollution generally. By the enactment Congress declared it to be the policy of the United States "to regulate the dumping of all types of materials into ocean waters and to prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities". 33 *U.S.C.* §1401(b). Except as authorized by a permit issued pursuant to either Section 1412 or Section 1413 of the title, and subject to regulations issued pursuant to Section 1418 of the title, all transportation of any material for the purpose of dumping it into the ocean, as well as the dumping itself was prohibited. 33 *U.S.C.* §1411.

Except as to dredged material, regulated by Section 1413 of the statute, and in relation to radioactive waste, for which no permit could be issued, EPA was authorized to issue permits for dumping material into ocean waters where the administrator determined "that such dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, eco-

logical systems or economic potentialities." 33 *U.S.C.* §1412. In establishing such criteria the administrator was directed to consider, although not be limited to: the need for the proposed dumping; the effect of such dumping on human health and welfare; the effect of such dumping on fisheries resources, shorelines and beaches; the effect of such dumping on marine ecosystems; the persistence and permanence of the effects of the dumping; the effect of dumping particular volumes and concentrations of such materials; appropriate locations and methods of land-based alternatives and "the probable impact of requiring use of such alternate locations or methods upon considerations affecting the public interest"; and the effect on alternate uses of oceans. 33 *U.S.C.* §1412(a).

In establishing or revising such criteria the administrator was directed to consult with federal, state and local officials and interested members of the general public. No permit could be issued for a dumping of material which would violate applicable water quality standards. The administrator was authorized to designate sites and times for dumping. 33 *U.S.C.* §1412(c). A particular effort was made for consistency of this statute with the FW PCA amendments. S. Rep. No. 92-451 1972, *U.S. Code & Adm. News,* 4234, 4257.

As noted above, by virtue of the 1977 amendment of MPRSA, a terminal date was set for the ocean dumping of sewage sludge, *i.e.* December 31, 1981. 33 *U.S.C.* §1412a..

EPA has promulgated and is enforcing against all ocean dumpers of sewage sludge, including the New Jersey agency petitioners in this case, a highly detailed set of regulations for permits, geared to fixed schedules aimed at effecting cessation of ocean dumping of sewage sludge by the end of 1981.

The statute contains the same citizens suit provisions as FWPCA, including a savings clause. 33 *U.S.C.* §1415

(g)(5). It contains detailed civil and criminal sanctions for its enforcement. §1415.

While, under the act, the states are prohibited from adopting or enforcing any rule or regulation relating to ocean dumping, any state is permitted to propose to the administrator criteria relating to the dumping of materials into ocean waters within its jurisdiction or into other ocean waters to the extent of affecting waters within the jurisdiction of that state. 33 *U.S.C.* §1416(d). The administrator is permitted to adopt such criteria and issue accordant regulations to implement them if after hearing he determines that they are not inconsistent with the purposes of the law. *Ibid.*

Congress has made available very substantial funding for the design and creation under EPA supervision of suitable facilities as land-based alternatives for disposition of sewage sludge. MCSA has made applications for grants for such purposes and is in the course of active progress toward achieving land-based disposition of sewage sludge at an early date. It is believed that the other New Jersey petitioner agencies are also in the same process. However, very substantial technological-environmental* and financial difficulties need to be overcome in order to attain the statutory goal of termination of ocean dumping of sewage sludge by the end of 1981.

In these regards, it is significant that the statute mandates comprehensive and far-reaching research programs. 33 *U.S.C.* §1441 *et seq.* As of the date of adoption of

---

* Land-based alternatives to ocean dumping of sewage sludge are mainly either incineration or land-fill or composting. These, respectively, present substantial problems of pollution of the air and of leaching into subterranean aquifers. Note that in dealing with grants for construction of treatment works Congress directed in FWPCA that care should be taken that the ultimate disposal of sludge be effected "in a manner which will not result in environmental hazards". 33 *U.S.C.* §1281(d)(4).

the statute "only meager information [existed] with regard to what concentrations and which of the chemicals or toxicants have deleterious effects on the marine ecology and what processes can best be utilized to treat or remove such materials prior to discharge to the marine waters". S. Rep. No. 92-451, 1972 *U.S. Code Cong. & Adm. News,* 4232, 4240. The field involved is obviously one of high scientific and economic technicality, especially suited to oversight by an expert administrative agency operating under fixed and uniform Congressional guidelines, rather than by *ad hoc* disposition in common-law tort suits.

3. Considerations of law and policy bespeak preemption in this area.

Various tests for preemption by statute laid down by this Court meet the present situation. The regulatory statutes as they now stand demonstrate an "implicit legislative design" calling for preemption, see *Philadelpia* v. *New Jersey, supra,* (437 *U.S.* at 620, n.4), and any continued availability of federal common-law nuisance actions against sewerage agencies operating under the regulatory statutes would entail "the general incompatibility with basic federal objectives" implicit in such legislation. *Ibid.* In our view, continued acceptance by federal courts of nuisance actions against public sewerage agencies situated like these petitioners would "prevent the accomplishment and execution of the full purposes and objectives of Congress" in creating the regulatory mechanism represented by FWPCA and MPRSA. *Jones* v. *Roth Packing Co., supra,* (430 *U.S.* at 526). See also *Burbank* v. *Lockheed, supra* (411 *U.S.* at 633), commenting upon "the pervasive nature of the scheme of federal regulation" involved in the statute there held to effect preemption of state law.

It does not seem to us that it should make any difference that the object of preemption is federal common law

as distinguished from state law. The same principles appear logically applicable, and are, indeed, compelled by the doctrine of federal legislative supremacy in matters of national concern.

We note that at this writing the question of preemption of a state's right to bring a federal common-law nuisance action against a public sewerage agency is before this court on certiorari (No. 79-408) to review the decision of the Seventh Circuit Court of Appeals in *People of State of Ill.* v. *City of Milwaukee,* 599 *F.2d* 151 (1979). While we are in agreement with the position of Milwaukee in that case, we would not regard an affirmance of the Court of Appeals there as precluding a holding in favor of these petitioners in this case. Our position is consistent with the continued viability of a federal nuisance action when instituted by a state. Secondly, the instant case involves the matter of ocean dumping of sewage sludge—not a factor in the *Illinois* case. Success of the instant plaintiffs would entail the inculpation of ocean dumping as much or more than discharge of sewage effluent. The interrelated and cumulative comprehensiveness of FWPCA and MPRSA in the ocean pollution area impellingly suggests a grand strategy by Congress in these related fields to preclude further maintenance of harassing common-law nuisance actions in federal courts against public sewerage agencies attempting to meet the goals of these statutes.

The anomaly of judicial proscription of conduct expressly permitted by authorized regulatory agencies has been noted in several decisions. See *Committee for Jones Falls Sewage System* v. *Train,* 535 *F.2d* 1006, 1009 (4 Cir. 1976); *Potomac River Ass'n. Inc.* v. *Lundeberg Maryland Seamanship Schools,* 402 *F.Supp.* 344 (D. Md. 1975); *New England Legal Foundation* v. *Costle,* 475 *F.Supp.* 425, 441-442 (D.Conn. 1979). ("This Court will not devise an equitable remedy to proscribe the very conduct that EPA, acting in its regulatory capacity pursuant to statutory man-

date, has specifically legitimated"); *cf. United States* v. *Atlantic-Richfield Co.*, 478 *F.Supp.* 1215, 1218 n.5 (D. Mont. 1979), where the court, although failing to find preemption against a tort action by the United States in the Clean Air statutory context, nevertheless said:

> "There are many reasons which would make one exclusive administrative system of controlling air pollution desirable. The whole matter is highly complex and involves the intricacies of chemistry, engineering and economics. Courts are not especially equipped to deal with these problems * * * If the courts are permitted to interfere, their decisions will sooner or later come into conflict with the administrative decisions and create confusion and uncertainty".

In *Committee for Jones Falls Sewage System* v. *Train, supra,* (539 *F.2d* 1006), in rejecting on the merits an action by private groups and individuals to enjoin the grant of EPA permits for sewer connections and to revoke other existing permits, Judge Haynsworth wrote:

> "Indeed it would be an anomaly to hold that there was a body of federal law which proscribes conduct which the 1972 Act of Congress [FWPCA] legitimates. The defendants are in compliance with the statute. They are operating under a permit issued in accordance with the statute and the authorization of the EPA. The Congress and the Executive Department, acting through the EPA, have declared their conduct lawful until the time for the application of more restrictive standards." *Id.* at 1009.

It is earnestly submitted that every consideration of sound law, environmental policy and the expeditious achievement of the legislative goals here implicated dictates immunity from federal common-law nuisance litigation for public sewerage agencies which are functioning under the regulative control and oversight of the agencies charged with the administration and enforcement of

FWPCA and MPRSA. Such sewerage agencies should not have to meet multiple inconsistent discharge or dumping standards. Moreover, it seems particularly invidious that such agencies should have to face the prospect of multi-million dollar damage suits, the successful consummation of which would clearly operate at cross-purposes with established federal pollution-control policy and divert to private coffers dollars sorely needed to meet the difficult technological requirements of compliance with federal regulations. Damage judgments in such actions would also indirectly subvert the federal funds being appropriated by Congress to these agencies to assist financially hard-pressed local communities in meeting the federal objectives. Such results cannot reasonably be thought within the legislative contemplation as derived from a fair appraisal of the statutes and their history.

The same considerations are supported by the unanimous view of the legal-environmental experts, quoted hereinabove, to the effect that the judicial common-law approach to environmental pollution is functionally useless *vis-a-vis* the alternative of comprehensive federal legislative and administrative regulations and in fact is incompatible with the latter.

For the foregoing reasons, it is submitted that preemption of the federal common-law nuisance remedy, at least to the limited extent argued for herein, should be judicially determined in this cause.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Court of Appeals should be reversed and the complaint ordered dismissed as against these petitioners.

Respectfully submitted,

STEPHEN J. MOSES
1 Essex Street
Hackensack, New Jersey 07601
(201) 343-6612
Counsel for Petitioner,
Bergen County Sewerage Authority
MENELAOS W. TOSKOS
Of Counsel

VINCENT J. JENNINGS
Of Counsel for Petitioner
Township of Middletown Sewerage Authority
Furman & Jennings, Attorneys

MILTON B. CONFORD
Wilentz, Goldman & Spitzer
A Professional Corporation
900 Route 9
Woodbridge, New Jersey 07095
(201) 636-8000
Counsel for Petitioners,
Middlesex County Sewerage Authority and
Township of Middletown Sewerage Authority
FRANCIS X. JOURNICK
MARVIN J. BRAUTH
Of Counsel

DEC 8 1
MICHAEL RODAK, J

Nos. 79-1711; 79-1754; 79-1760; 80-12 (Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF NEW YORK AND ABRAHAM BEAME,
Petitioners (79-1760,

—v.—

NATIONAL SEA CLAMMERS ASSOCIATION
AND GOSTA LOVGREN

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS CITY OF NEW YORK AND BEAME

ALLEN G. SCHWARTZ
Corporation Counsel
of the City of New York
Attorney for Petitioners
City of New York and Beame
100 Church Street
New York, New York 10007
(212) 566-2091

LEONARD KOERNER,
STEPHEN P. KRAMER,
of Counsel.

QUESTIONS PRESENTED*

1. Whether the Federal Water Pollution Control Act, 33 U.S.C. (& Supp. I) §§ 1251 *et seq.*, and the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. (& Supp. I) §§ 1401 *et seq.*, imply a private right of action independent of the rights explicitly created by the citizen suit provisions of those Acts, 33 U.S.C. §§ 1365 and 1415(g).

2. Whether a private citizen has standing to maintain a federal common law nuisance action for alleged damages resulting from ocean pollution as a general federal question under 28 U.S.C. § 1331.

3. Whether any federal common law nuisance action for alleged damages resulting from ocean pollution, if available to a private citizen, is not preempted by the present regulatory scheme governing ocean pollution established by the Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act.

---

* The other parties not appearing in the caption named as appellees in the court below were the United States Environmental Protection Agency; Russell E. Train, individually and as Administrator of the United States Environmental Protection Agency; United States Army Corps of Engineers; Martin R. Hoffman, individually and as Secretary of the United States Department of the Army; Bergen County Sewer Authority; The Joint Meeting of Essex and Union Counties; Passaic Valley Sewerage Commissioners; Middlesex County Sewerage Authority; The Linden Roselle Sewerage Authority; Middletown Sewerage Authority; the City of Glen Cove; and the City of Long Beach. Others named as parties in the District Court were the New York Department of Environmental Conservation; Ogden R. Reid, individually and as Commissioner of the New York Department of Environmental Conservation; New Jersey Department of Environmental Protection; David J. Bardin, individually and as Commissioner of New Jersey Department of Environmental Protection; County of Westchester Department of Environmental Facilities; and the West Long Beach Sewer District.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1, 1a-15a
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	9
POINT I — The Water Pollution Control Statutes Here In Issue Contain Explicit Statutory Remedies Which Define Citizen Rights. No Other Remedies Can Be Implied	11
POINT II — Congress Has Determined That State Common Law, Not Federal, Is To Provide The Rule Of Decision For Torts Occurring In The Territorial Waters Of The United States And That The United States Would Not Assert General Jurisdiction Over Ocean Waters Adjacent To Territorial Waters. No Basis Exists For The Creation Of A Federal Common Law Nuisance Claim For Ocean Pollution Assertable By Private Parties	15
POINT III — The Clean Water And The Marine Protection Acts Present A Comprehensive Scheme For The Achievement Of Levels Of Water Quality Which Protect State Sovereign Interests And The Public Health And Welfare. The Statutory Scheme Leaves No Room For The Development Of Com-	

PREVIOUS PAGE WAS BLANK

PAGE

mon Law Standards Of Acceptable Levels Of Pollution Or Water Quality 30

CONCLUSION 35

Appendix of Relevant Statutory Provisions

1) Marine Protection, Research and Sanctuaries Act, 33 U.S.C. (Supp. II) 1401 *et seq.* 1a

2) The Outer Continental Shelf Lands Act, 43 U.S.C. (Supp. II) sections 1332, 1333, and 1339 ..... 8a

3) The Outer Continental Shelf Lands Act, 43 U.S.C. (1976) (superseded) sections 1332 and 1333 ..... 14a

4) The Submerged Lands Act of 1953, 33 U.S.C. 1301(e) and 1311(a) and (d) 15a

TABLE OF AUTHORITIES

Cases	PAGE
Aqua Slide 'N' Dive Corp. v. Consumer Product Safety Comm'n, 569 F.2d 831 (5th Cir. 1978)	33
Arizona v. California, 373 U.S. 546 (1963)	31
Askew v. American Waterways Operations, Inc., 411 U.S. 325 (1973)	22, 29
CETA Workers' Organizing Committee v. City of New York, 617 F.2d 926 (2nd Cir. 1980)	12
Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979)	12
Chicago, R.I. & Pac. Ry. Co. v. McGlinn, 114 U.S. 542 (1885)	28
City of Evansville, Indiana v. Kentucky Liquid Recycling Corp., 604 F.2d 1008 (7th Cir. 1979)	12
Clearfield Trust Co. v. United States, 318 U.S. 363 (1943)	22
Committee for Jones Falls Falls Sewage System v. Train, 539 F.2d 1006 (4th Cir. 1976)	34
Commonwealth of Massachusetts v. Andrus, 594 F.2d 872 (1st Cir. 1979)	29
Connecticut v. Massachusetts, 282 U.S. 660 (1931)	21
Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81 (2d Cir. 1972)	18
Cort v. Ash, 422 U.S. 66 (1975)	14
Costle v. Pacific Legal Foundation, 48 U.S.L.W. 4243, No. 78-1472 (March 17, 1980)	5
Cunard Steamship Co. v. Mellon, 262 U.S. 100 (1923)	27

PAGE

Darling v. City of Newport News, 249 U.S. 540 (1919).17, 20, 33

D'Oench, Duhme & Co. v. Federal Deposit & Insurance Corp., 315 U.S. 447 (1942) 22

Environmental Protection Agency v. California ex rel. State Water Resources Board, 426 U.S. 200 (1976) ... 4

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).....18, 21

Ethyl Corp. v. E.P.A., 541 F.2d 1 (D.C. Cir.) (*en banc*), *cert. den.* 426 U.S. 941 (1976) 34

Forrester v. Consumer Product Safety Comm'n, 559 F.2d 774 (D.C. Cir. 1977) 33

Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) .19, 20

Gilman v. Philadelphia, 3 Wall. (70 U.S.) 713 (1865) ... 17

Guthrie v. Alabama By-Products Co., 328 F.Supp. 1140 (N.D. Ala. 1971) 19

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) ...11, 19-21, 29-31

Kansas v. Colorado, 185 U.S. 125 (1902) 21

Kansas v. Colorado, 206 U.S. 46 (1907) 20

Kentucky v. Indiana, 281 U.S. 163 (1930)..... 20

Miree v. DeKalb Co., 433 U.S. 25 (1977) 18

Missouri v. Illinois, 200 U.S. 496 (1906) 20

Moore v. Hampton Roads Sanitation Comm'n, 557 F.2d 1030 (4th Cir. 1977) 33

New Hampshire v. Louisiana, 108 U.S. 76 (1883)..... 20

New Jersey v. New York, 345 U.S. 369 (1953)..... 20

New Jersey v. City of New York, 283 U.S. 473 (1931).. 29

New York v. New Jersey, 256 U.S. 296 (1921) 33

North Dakota v. Minnesota, 263 U.S. 365 (1923)..... 21

PAGE

Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971) 22

Pennsylvania v. New Jersey, 426 U.S. 660 (1976)..... 20

Perry v. Sinderman, 408 U.S. 593 (1972) 18

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978)..... 31

Red Star Towing & Transportation Co. v. Dept. of Transportation of New Jersey, 423 F.2d 104 (3rd Cir. 1970)..... 18

Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969) 24

Sandberg v. McDonald, 248 U.S. 185 (1918) 27

Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940) 28

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 14, 22

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) . 14

Treasure Salvors Inc. v. Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978)..... 26

Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974).. 20

United States v. California, 332 U.S. 19 (1947)..... 23

United States v. California, 381 U.S. 139 (1965)..... 27

United States v. Coolidge, 1 Wheat. (14 U.S.) 415 (1816) 17

United States v. Hudson, 7 Cranch (11 U.S.) 32 (1812). 17

United States v. Louisiana, 394 U.S. 11 (1969) 26, 27

United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655 (1973)..... 18

United States v. Perez-Herrera, 610 F.2d 289 (5th Cir. 1980)..... 27

PAGE

United States v. Republic Steel Corp., 362 U.S. 482 (1960) 18

United States v. Standard Oil Co. of California, 332 U.S. 301 (1947)..... 23

United States Steel Corp. v. Train, 556 F.2d 822 (7th Cir. 1977)..... 5

Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966) 18

Wheaton v. Peters, 8 Pet. (33 U.S.) 591 (1834) 17, 18

Wheeldin v. Wheeler, 373 U.S. 647 (1965) 23

Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1880) 16-19

Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888) 20

Wyandotte Transportation Co. v. United States, 389 U.S. 191 (1967)..... 34

Statutes, Proclamations and International Conventions

Act of August 11, 1888, c. 860, § 9 (25 Stat. 424)..... 18

Clean Air Act, Section 304(e), 42 U.S.C. (Supp. II) 7604(e) 12, 13

Clean Water Act (Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by the Clean Water Act of 1977, Pub. No. 95-217, 91 Stat. 1566).....*passim*

33 U.S.C. 1251(b) 14

33 U.S.C. 1281(g)(2)(A) 3, 34

33 U.S.C. 1311 6

33 U.S.C. 1311(b)(1) 34

33 U.S.C. 1311(b)(1)(C) 3, 4, 5 30, 31

PAGE

33 U.S.C. 1311(b)(2)(B) 3
33 U.S.C. 1311(h) 3
33 U.S.C. 1311(i) 3
33 U.S.C. 1312 4
33 U.S.C. 1312(a) 4
33 U.S.C. 1312(b)(2) 4
33 U.S.C. 1313 .....5, 14, 30, 31
33 U.S.C. 1314(d)(1) 3
33 U.S.C. 1316(d) 4
33 U.S.C. 1322(f) 4
33 U.S.C. 1341(a)(1) 5
33 U.S.C. 1342(a)(2) 3, 5
33 U.S.C. 1342(a)(1) 5, 31
33 U.S.C. 1342(b)(3)-(b)(5) 5, 6, 31
33 U.S.C. 1342(d)(2) 6
33 U.S.C. 1342(j) 5
33 U.S.C. 1342(k) 6, 30
33 U.S.C. 1343 .....4, 6, 30
33 U.S.C. 1362(7) 3
33 U.S.C. 1365(a) 12
33 U.S.C. 1370 4
33 U.S.C. 1375(c) 3
Comprehensive Employment and Training Act, 29 U.S.C. (Supp. II) 801 *et seq.* 12
Convention on the High Seas, 13 U.S.T. (pt. 2) 2313, T.I.A.S. 5200 26

PAGE

Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 26 U.S.T. 2403, T.I.A.S. No. 8165 (1962) 8

Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (pt. 2) 1607, T.I.A.S. No. 5639 (1964) 26

Exec. Proc. 2667 (Sept. 28, 1945), 59 Stat. 884 23

42 U.S.C. 1983 12

Interstate Sanitation Commission, 49 Stat. 932 5

Marine Protection, Research and Sanctuaries Act of 1972, Pub. L. No. 95-532, 86 Stat. 1052, as amended by Pub. L. No. 93-254, 88 Stat. 50 and Pub. L. No. 95-153, 91 Stat. 1255, 33 U.S.C. (& Supp. II) 1401-1444 ..... *passim*

33 U.S.C. 1401(b) 7

33 U.S.C. 1411 7

33 U.S.C. 1412 7

33 U.S.C. 1412(a) 7, 30, 31

33 U.S.C. (Supp. II) 1412a 9

33 U.S.C. 1413 7

33 U.S.C. 1415(g) 12

Outer Continental Shelf Lands Act of 1953, 43 U.S.C. (1976 & Supp. II) 1331-1343, 67 Stat. 462-470 ..... 1, 24, 25

43 U.S.C. (1976) 1332(a) 24

43 U.S.C. (1976) 1332(b) 25

43 U.S.C. (1976) 1333 ..... 24, 25

43 U.S.C. (Supp. II) 1332(1) 25

43 U.S.C. (Supp. II) 1332(2) 25

43 U.S.C. (Supp. II) 1333(a) 25

PAGE

43 U.S.C. (Supp. II) 1349(a)(1) 25

43 U.S.C. (Supp. II) 1349(b)(1) 25

43 U.S.C. (Supp. II) 1349(b)(2) 25

Rivers and Harbors Act of 1899, 30 Stat. 1152, 33 U.S.C. 403, 407 .....6, 18

Submerged Lands Act of 1953, 43 U.S.C. 1301-1315....1, 15, 24

Supervisory Harbors Act of 1888, 25 Stat. 209, 33 U.S.C. 441-451(b) 6

28 U.S.C. 1331 .....10, 19, 20, 22

Regulations

40 C.F.R. 122.3(bb) 3

40 C.F.R. 122.3 3

40 C.F.R. 124-125 5

40 C.F.R. (1973) Part 220.3; 223.1(d) 7, 8

40 C.F.R. (1973) Part 227 .....7, 8, 30

40 C.F.R. Part 227, Subpart (B), Subpart (C); 227.3, 227.4, 228.1 .....8, 9

38 Fed. Reg. 28610-619 .....7, 8

42 Fed. Reg. 2462 8

45 Fed. Reg. 3384 *et seq.* 5

45 Fed. Reg. 33423 3

45 Fed. Reg. 65942 4

Miscellaneous:

Bator, Mishkin, Shapiro, Wechsler, *Hart and Wechsler, The Federal Courts and the Federal System,* (2nd ed. 1973) 17, 28

PAGE

W. Bishop, *International Law* (3rd ed. 1971) 21, 27

Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier,* 6 Stan. L. Rev. 2334 (1953) .. 25

Currie, *Federal Courts, Cases and Materials* (2nd ed. 1971)..... 21

Friendly, *In Praise of Erie—and the New Federal Common Law,* 39 New York Univ. L. Rev. 383 (1964).... 22

Heinzen, *The Three Mile Limit: Preserving The Freedom of the Seas,* 11 Stan. L. Rev. 597 (1959)..... 24

H.R. Rep. 92-361, 92 Cong., 1st Sess..... 6

A Legislative History of the Water Pollution Control Act of 1972, 93rd Cong., 1st Sess. (Comm. Print. 1973)..12, 13

Note, *The Original Jurisdiction of the United States Supreme Court,* 11 Stan. L. Rev. 665 (1959) 21

Prosser, *Law of Torts* (4th ed. 1971) 33

Prosser, *Private Action for Public Nuisance,* 52 Va. L. Rev. 997 (1966).....20, 32, 33

S. Rep. No. 411, 83rd Cong., 1st Sess. (1953) 25

S. Rep. No. 91-1196, 91st Cong., 2nd Sess. 13

S. Rep. No. 92-451, 92nd Cong., 1st Sess. 6

S. Conf. Rep. No. 91-1783, 91st Cong., 2nd Sess. (1971) 13

Schwartzenberger, *The Dynamics of International Law* (1976) 27

Von Moschzisker, R., *Common Law and Our Federal Jurisprudence,* 74 U. Pa. L. Rev. 109, 270, 367 (1925) 23

Warren, *New Light on the Federal Judiciary Act of 1789,* 37 Harv. L. Rev. 49 (1923)..... 17

OPINIONS BELOW

The opinion of the court of appeals is reported at 616 F.2d 1222. The opinion and judgment of the court of appeals are reproduced in the Middlesex Appendix at 1a and 37a. The opinion of the district court is not officially reported and is reproduced in the Middlesex Appendix at 40a.

JURISDICTION

The judgment of the court of appeals (Middlesex Appendix 38a) was entered on February 5, 1980. A timely petition for certiorari was filed by petitioners herein on May 5, 1980. An order granting the petition for certiorari and consolidating it with Nos. 79-1711, 79-1754, and 80-12 was entered on October 20, 1980 (Joint Appendix 48a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Federal Water Pollution Control Act, 33 U.S.C. (& Supp. I) 1251 *et seq.* are reproduced in the Middlesex Appendix at 72a *et seq.* The pertinent provisions of the Marine Protection, Research and Sanctuaries Act, 33 U.S.C. (& Supp. II) 1401 *et seq.*, the Outer Continental Shelf Lands Act, 43 U.S.C. (Supp. II) 1331 *et seq.*, and the Submerged Lands Act of 1953, 33 U.S.C. 1301 *et seq.* are reproduced in an Appendix to this brief.

STATEMENT OF THE CASE

A. Pleadings and Proceedings Below

Respondent National Sea Clammers Association is an association whose members make their living harvesting fish and shellfish from the water and ocean beds of the Atlantic Ocean near New York and New Jersey. Respondent Lovgren is an

individual similarly employed. Petitioners City of New York and Beame,[1] and the other parties in the District Court, are various federal, state and local officials and governmental departments that are charged with environmental protection or are responsible for sewage treatment and disposal.

Respondents allege that petitioners discharged or permitted the discharge of certain nutrient-rich sewage and toxic wastes into the Atlantic Ocean or its tributaries. Respondents complained of discharges allegedly made both in compliance with and in violation of federal regulatory statutes. They alleged that in 1976 these discharges caused death and other adverse effects on marine life, and, as a result, they sustained business losses.

The local governments discharge treated and untreated sewage from pipes ("point sources") into the territorial waters off their respective states pursuant to federal permits. In addition, sewage sludge, a by-product of modern sewage treatment, is placed in vessels which transport the materials and discharge them at various locations approximately 12 miles off the United States coastline. This dumping is also done pursuant to federal permits.

The complaint was dismissed by the district court on motions for summary judgment, with prejudice, on all claims except for two said to arise under state law which were dismissed without prejudice. The court of appeals reversed the order of dismissal of those claims based upon the Federal Water Pollution Control Act, 33 U.S.C. 1251-1376, the Marine Protection, Research and Sanctuaries Act, 33 U.S.C. 1401-1444, the federal common law of nuisance, and the maritime tort law.

---

1 Edward I. Koch replaced Abraham Beame as Mayor of the City of New York on January 1, 1978. Abraham Beame was sued individually and in his official capacity as Mayor.

B. Regulatory Scheme of the Clean Water Act

The Clean Water Act[2] provides for both federal and state regulatory power over the discharge of pollutants into the navigable waters, which are defined as "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). Federal technology-based effluent limitations for all discrete point sources of pollution must be met by certain specified dates. For publicly owned treatment works, with which we are concerned here, the Act requires application of "secondary treatment as defined by the Administrator" of the United States Environmental Protection Agency ("the Administrator") no later than July 1, 1977 (33 U.S.C. 1311(b)(1)(B), 1314(d)(1)), subject to extension to July 1, 1983 in specified instances. 33 U.S.C. (Supp. II) 1311(i). The secondary treatment requirement may be modified for publicly owned plants that discharge into marine waters upon a showing that state water quality standards will not be violated and that other potential uses of the waters will be protected. 33 U.S.C. (Supp. II) 1311(h). By July 1, 1983, all publicly owned plants must employ the "best practicable waste treatment technology over the life of the works," 33 U.S.C. (and Supp. II) 1311(b)(2)(B); 1281(g)(2)(A).

Discharges of untreated sewage resulting from overflows of combined storm and sanitary sewage systems are not considered publicly owned treatment works requiring the application of secondary treatment technology. See 40 C.F.R. 122.3(bb), 45 Fed. Reg. 33423 (1980) (to be codified at 40 C.F.R. 122.3). Hence they are regulated by conditions in discharge permits under 33 U.S.C. 1311(b)(1)(C) and 1342 (a)(2). Congress recently required the Administrator to submit a report on the problem of combined storm and sanitary sewer overflows, 33

---

2 The Clean Water Act refers to the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566. See also Act of Dec. 28, 1973, Pub. L. No. 93-207, 87 Stat. 906; Act of Nov. 2, 1978, Pub. L. No. 95-576, 92 Stat. 2467.

U.S.C. (Supp. II) 1375(c), but did not mandate that they be eliminated.

In addition to his power to mandate the use of specific technology and specific discharge limitations, the Administrator also has authority to control water quality. Should a particular discharge from a point source, or the collective impact of a group of point sources, interfere with the attainment of that level of water quality necessary to protect a broad spectrum of potential uses, including protection of fish and other wildlife, the Administrator may impose stricter standards than those otherwise mandated. 33 U.S.C. 1312(a). However, stricter standards may not be imposed under this authority if a person affected by the proposed limitation demonstrates that there is no "reasonable relationship between the economic and social costs and the benefits to be achieved." 33 U.S.C. 1312(b)(2).

The Administrator has been given powers supplementary to those given in 33 U.S.C. 1312 over discharges into the oceans. The Administrator is authorized to promulgate guidelines for the degradation of the waters of the territorial seas, the contiguous zone, and the oceans. 33 U.S.C. 1343. All discharges must be made in compliance with the guidelines, which take into account a broad array of environmental factors. See 45 Fed. Reg. 65942-54 (1980).

States are allowed to impose more stringent controls than those imposed by federal authorities by either of two means. First, States have blanket authority under federal law to impose stricter effluent limitations on point sources within their jurisdiction than those imposed by the federal authorities.[3] 33 U.S.C. 1370. See *Environmental Protection Agency* v. *California ex rel. State Water Resources Control Board,* 426 U.S. 200, 218 (1976). Second, States may adopt overall water quality

---

3 One exception is that facilities built after 1972 in conformity with applicable performance standards are given a grace period of up to ten years. 33 U.S.C. 1316(d). *See also* 33 U.S.C. 1322(f) (marine sanitation devices).

standards which may require a source to meet stricter effluent limitations than federal technology-based limitations.[4] 33 U.S.C. 1311(b)(1)(C). No cost benefit analysis is required for a State's imposition of stricter effluent limitations.

States are mandated to develop, subject to the Administrator's approval, water quality standards which cover both intrastate and interstate waters. 33 U.S.C. 1313.[5] Since these water quality standards must be reflected in any discharge permit, 33 U.S.C. 1311(b)(1)(C), including a permit for a point source affecting the waters of a neighboring State, 33 U.S.C. 1341 (a)(2), the individual States are given a means of protecting their waters from sources of out-of-state pollution. Out-of-state discharges incompatible with another state's water quality standards must be controlled by the regulatory authority issuing the permit to reflect the receiving state's water quality standards. *Id.* The applicant for any discharge permit must certify that the discharge will comply with applicable effluent limitations and state water quality standards. 33 U.S.C. 1341 (a)(1).

All interested parties, including a State whose water quality standards may be affected by a discharge, are entitled to notice and an opportunity for a hearing regarding the issuance of a permit. See *Costle* v. *Pacific Legal Foundation,* 48 U.S.L.W. 4243, No. 78-1472 (March 17, 1980); 33 U.S.C. 1341(a)(1), 1342(a)(1), (b)(3)-(b)(5), (j); 40 C.F.R. Parts 124-125; 45 Fed. Reg. 3384 *et seq.* (1980). An affected State may submit written recommendations to the Administrator or, if a State is administering the discharge permits, to the permitting State. If the permitting State does not accept the recommendations, it must

---

4 See *United States Steel Corp.* v. *Train,* 556 F.2d 822, 830 (7th Cir. 1977).

5 The Interstate Sanitation Commission, a tri-state agency created pursuant to an agreement among New York, New Jersey and Connecticut to cope with pollution of New York Harbor and adjacent coastal waters pursuant to an interstate compact, see 49 Stat. 932, has established water quality standards for coastal waters within its jurisdiction.

notify the affected State and the Administrator of its reasons. 33 U.S.C. 1342(b)(5). Thereafter the Administrator may refuse to approve the permit, in which case the permit may not be issued. 33 U.S.C. (Supp. II) 1342(d)(2).

Compliance with a permit is deemed compliance with specified sections of the Act. 33 U.S.C. 1342(k). Most relevant here is that the sections specified in section 1342(k) include 33 U.S.C. 1311 and 1343—the sections which require permits to reflect effluent limitations necessary to protect state water quality standards and the federal guidelines for the degradation of the oceans. Hence compliance with a permit is deemed compliance with both those specific statutory sections limiting discharges of pollutants and with the water quality standards imposed by either the discharger's home State, any other State, or the federal government.

C. Regulatory Scheme of the Marine Protection Act.

Prior to the enactment of the Marine Protection Act,[6] the United States had no comprehensive law controlling the ocean disposal of wastes.[7] The Marine Protection Act, enacted in response to increasing concerns regarding unregulated dumping,[8] established a single, uniform regulatory scheme regarding

---

6 The Marine Protection Act refers to the Marine Protection, Research and Sanctuaries Act of 1972, Pub. L. No. 95-532, 86 Stat. 1052, as amended by Pub. L. No. 93-254, 88 Stat. 50 and Pub. L. No. 95-153, 91 Stat. 1255, 33 U.S.C. (& Supp. II) 1401-1444.

7 The Rivers and Harbors Act of 1899, 30 Stat. 1152, 33 U.S.C. § 407, and the Supervisory Harbors Act of 1888, 25 Stat. 209, 33 U.S.C. §§ 441-451(b), authorized the Corps of Engineers to regulate dumping within the navigable waters of the United States and beyond the territorial seas where barges transporting materials for dumping passed through the ports of New York, Baltimore or Hampton Roads, Virginia. Other federal statutes regulating the intentional or accidental discharge of certain materials in ocean waters were even more limited in scope, and unlike the 1888 and 1899 Acts did not require permits for ocean disposal.

8 See H.R. Rep. 92-361, 92d Cong. 1st Sess.; S. Rep. No. 92-451, 92d Cong. 1st Sess.

the dumping of material into ocean waters from vessels travelling from the United States, or by any United States vessel, or by any person if the dumping occurs in the territorial waters of the United States or the contiguous zone.

The Marine Protection Act regulates the dumping of all types of materials "to prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health, welfare or amenities, or the marine environment, ecological systems, or economic potentialities." 33 U.S.C. 1401(b). Unless authorized by permit "[n]o person shall transport from the United States . . . any material for the purposes of dumping it into the ocean." 33 U.S.C. 1411. Permits for ocean dumping of dredged material are issued by the Secretary of the Army through the Corps of Engineers and permits for dumping of nondredged material, including sewage sludge, are issued by the Administrator. 33 U.S.C. 1412, 1413. In no event may dumping permits be issued except where the Administrator or the Secretary determines that the "dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems or economic potentialities." 33 U.S.C. 1412(a), 1413(a). Nor may a permit be issued which will violate applicable water quality standards 33 U.S.C. 1412(a). The Administrator is required to promulgate criteria for the evaluation of permit applications for disposal of both dredged and nondredged material. 33 U.S.C. 1412(a), 1413(b).

Initial regulations were promulgated on October 15, 1973. 38 Fed. Reg. 28610. The regulations emphasized the environmental acceptability of ocean disposal of the wastes in question, focusing primarily on their physical and chemical characteristics. See 40 C.F.R. Part 227, as published at 38 Fed. Reg. 28618.

The regulations established several categories of permits. Material that complied with the Part 227 numerical criteria could qualify for a "special" three-year dumping permit. 40 C.F.R. 220.3(b), 38 Fed. Reg. 28614. Where the material could

not satisfy Part 227 limitations, but the applicant could show a need to dump and lack of alternatives which outweighed temporary or permanent environmental impacts, the regulations authorized the Administrator to issue an "interim" permit for a term of not more than one year. 40 C.F.R. 220.3(d), 38 Fed. Reg. 28614. Sites for dumping were designated in the individual permits. 40 C.F.R. 223.1(d); 38 Fed. Reg. 28616. Wastes which could present a hazard to fishing were to be disposed of at sites precluding such an interference. 40 C.F.R. 227.32; 38 Fed. Reg. 28619.

In 1977 the Administrator promulgated revisions to the regulations. 42 Fed. Reg. 2462 (1977). These revisions were prompted in part by ratification of the International Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 26 U.S.T. 2403, T.I.A.S. No. 8165.[9] The revised regulations refined the criteria for determining environmental acceptability. Instead of relying chiefly on a simple description of the constituents of the material, the regulations require bioassay tests to determine the actual effects of the material on exposed marine organisms. See 40 C.F.R.

---

9 In the fall of 1972, an intergovernmental conference held in London adopted the Convention. At that time the United States signed the Convention; and on August 3, 1973, the Senate gave its advice and consent. The Convention was drafted

> to prevent the pollution of the sea by the dumping of wastes and other matter that is liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.

Convention, Article I.

The Convention prohibits ocean disposal of materials containing certain enumerated substances except under specified conditions. Convention, Annex I. The Convention also requires that special care be taken in the ocean disposal of certain other specified chemicals and materials which are likely to pose obstacles to navigation. Convention, Annex II.

On March 2?, 1974, Congress amended the Act to incorporate into domestic law those features of the Convention which were not then included in the basic statute. Public Law 93-254. 88 Stat. 50. That amendment became effective on August 30, 1975.

Part 227, Subpart B. In addition, the 1977 regulations added more specific provisions for assessing the need for the dumping, 40 C.F.R. Part 227, Subpart C, and provided new requirements regarding the significance of the need factor. Interim permits are available for the dumping of materials which do not comport with certain environmental impact criteria if specified prohibited materials are present only as trace elements, and if the need for dumping outweighs its environmental impact on potential other uses of the ocean. 40 C.F.R. 227.3.

Specific sites for the dumping of material, based on historical locations, were designated. The dumping of municipal sewage sludge was continued at a location approximately twelve miles from the shore. See 40 C.F.R. 228.12.

The Act was amended in 1978 to mandate the cessation of municipal sewage sludge dumping by the end of 1981. Sewage sludge was defined as that sludge which unreasonably degrades the environment. 33 U.S.C. (Supp. II) 1412a.

SUMMARY OF ARGUMENT

(1)

The Clean Water and Marine Protection Acts each contain an express provision authorizing any citizen or person to sue "on his own behalf" to compel enforcement of the respective statutes. The express remedies apply both to persons specially injured and to those suing simply as private attorneys general; the express remedies are the exclusive means to redress violations of the Acts.

The legislative history of the Clean Water Act, and the legislative history of the Clean Air Act, on which the express remedy was modeled, evidence a clear legislative intent to preclude development of court-defined standards of reasonable levels of water and air quality, or other court-developed remedies beyond those explicitly authorized. Congress deliberately

chose not to create a damage remedy for violation of these statutes. Damages, if available, may be sought only under State law which is the traditional source of such a common law entitlement. Creation of an implied right of action for damages would be to create a remedy which Congress explicitly and intentionally rejected.

(2)

There are explicit holdings by this Court that federal courts have no jurisdiction to adjudicate common law claims brought by private parties regarding nuisances occurring in navigable waters. While this Court has original jurisdiction under the Constitution to adjudicate cases in which a State alleges that the acts of another State, or acts of citizens in another State, are interfering with its quasi-soverign interests, and the federal district courts have jurisdiction under 28 U.S.C. 1331 to adjudicate these cases, the federal common law applied in these disputes may not be asserted by private parties. Neither the Constitution nor any statute authorizes actions by private parties to seek redress of interstate pollution under a federal common law.

Analysis of the statutes and treaties governing the jurisdiction and powers of the United States in the oceans adjacent to its territorial waters demonstrates that Congress has not asserted sovereignty over these waters. An assertion of sovereignty is a prerequisite to the development of a common law determining competing property rights. Congress has carefully defined those public and private rights it wishes recognized in the ocean waters. These rights do not include a common law available to private parties. Congress has expressed its sovereign interest in the oceans adjacent to the United States in the multitude of statutes it has passed regulating conduct in the area; the legislative and political judgment of Congress should not be supplemented by a court-developed common law of legal duties and liabilities.

(3)

Congress has authorized the United States Environmental Protection Agency to promulgate minimum discharge limitations and water quality standards for the territorial seas of the United States and the adjacent oceans. Congress has further mandated that States adopt their own water quality standards which are included by reference into federal discharge and dumping permits. These statutory provisions—and particularly the federally enforceable state water quality standards—have given States a means of protecting their waters from sources of out-of-state pollution. The need for development of a federal common law identified in *Illinois* v. *City of Milwaukee,* 304 U.S. 64 (1972), has been satisfied by a statutory mechanism. Moreover, state and federal discharge limitations and water quality standards have been promulgated which in and of themselves preempt common law standards. Should these standards be violated and damages result, state common law affords redress.

POINT I

THE WATER POLLUTION CONTROL STATUTES HERE IN ISSUE CONTAIN EXPLICIT STATUTORY REMEDIES WHICH DEFINE CITIZEN RIGHTS. NO OTHER REMEDIES CAN BE IMPLIED.

The City of New York generally concurs with the arguments submitted by the Solicitor General of the United States in the Environmental Protection Agency's petition for certiorari regarding the question as to whether the statutes in issue can be construed to contain implied rights of action. We rely on the position set forth in that petition, and submit only the following additional observations:

1. The Court of Appeals concluded that the citizen suit provisions of the two statutes, and their concomitant prerequisites to suit, applied only to those plaintiffs who have no

personal stake in the lawsuit under traditional standing doctrines and not to those who allege special injury. This conclusion has no basis in the statutory language. The Clean Water Act provision provides that, subject to the notice requirement, "any citizen may commence a civil action on his own behalf." 33 U.S.C. 1365(a). The Marine Protection Act is identical except for the use of the word "person" in place of "citizen." 33 U.S.C. 1415(g). A person suing "on his own behalf" surely includes a person who has been specially injured.

2. A common sense reading of the savings clause does not support the inference that Congress intended to "preserve" an unexpressed remedy available to private parties alleging special injury. The savings clause preserves concurrent remedies—it neither grants rights or remedies, nor acknowledges their existence under federal law. Compare *Chapman* v. *Houston Welfare Rights Organization,* 441 U.S. 600, 617-18 (1979) (42 U.S.C. 1983 is an *authorizing* statute); see *City of Evansville, Indiana* v. *Kentucky Liquid Recycling Corp.,* 604 F.2d 1008, 1014 (7th Cir. 1979) (savings clause of Clean Water Act creates no rights); see also *CETA Workers' Organizing Committee* v. *City of New York,* 617 F.2d 926 (2nd Cir. 1980) (savings clause of Comprehensive Employment and Training Act lends no support to inference of Congressional intent that implied right of action existed concurrently with express right).

3. The legislative history of the citizen suit provision of the Clean Water Act demonstrates that it was modeled on a parallel provision in the Clean Air Act Amendments of 1970. *A Legislative History of the Water Pollution Control Act Amendments of 1972,* 93d Cong., 1st Sess. (Comm. Print 1973) (hereafter "Leg. Hist.") 1497. A review of the legislative history of the citizen suit provision of the Clean Air Act demonstrates an unequivocal intent of Congress not to save "implied remedies" under the Clean Air Act itself or to authorize a damage remedy for statutory violations.

In the original Senate version of the Clean Air Act amendments, from which the citizen suit provision was derived, the

savings clause itself referred to saving rights "under other law." S. Rep. No. 91-1196, 91st Cong., 2d Sess. p. 123; see also p. 39. Although the word "other" was dropped in the House Senate Conference, the conference report still described the savings clause of the Clean Air Act as preserving "[o]ther rights to seek enforcement of standards under other provision [sic] of law." Conf. Rep. No. 91-1783, 91st Cong., 2d Sess. § 304 (1971). Hence there appears to be no significance to the omission of the word "other" from the final bill.

The legislative history of the Clean Air Act also demonstrates an explicit intent not to create a damage remedy which the Court of Appeals has authorized in its decision below. The Senate Report describes the citizen suit provision thus:

> The section [304] does not, however, affect in any way whatever remedies such citizens or class of citizens might have under statutory or other law, nor does it provide for damage or nuisance actions. S. Rep. No. 91-1196, *supra* at 65.

This same point is reiterated in the Senate Report several times ("Section 304 would not substitute a 'common law' or court developed definition of air quality," *id.* at 36; "[t]here would be no jurisdictional amount required in section 304 nor is there any provision for the recovery of property or personal damages," *id.* at 38.

The only significant modification between the citizen provisions of the Clean Water Act and those of the Clean Air Act is that the Clean Water Act permits the courts to impose civil penalties in citizen suits. In this regard the Senate Report on the Clean Water Act emphasizes that the penalties are not available as damages to the citizen plaintiff:

> It should be noted that any penalties imposed would be deposited as miscellaneous receipts and not be recovered by the complainant. 2 Leg. Hist. 1497.

Hence the argument that an implied common law or other right of action for damages to fill in the "interstices" of this statute does not comport with the legislative history. This interstice was intentional.

4. In *Cort* v. *Ash,* 422 U.S. 66, 78 (1975), this Court identified four factors for ascertaining whether a private right of action may be implied in a statute. The first three factors provide a means for ascertaining legislative intent, which we have discussed above. *Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 575-576 (1979). The fourth *Cort* factor is whether the matter is one that has traditionally been relegated to State law, and whether a federal remedy is appropriate. As is set forth more fully in Points II and III *infra*, common law rights in navigable waters are matters traditionally relegated to State law. The interstate and international character of the oceans do not *ipso facto* call for the creation of a federal common law remedy. The federal courts have no non-statutory authority to enforce common law rights, even in "federal territories." See cases cited at p. 28 *infra.* Congress has expressed the national concern with ocean pollution in a complex array of statutes, none of which authorizes, explicitly or implicitly, development of a federal common law.

In the nation's territorial waters, Congress has evidenced no intent to oust the States from their traditional role as being the primary source of legal rights and duties. The Clean Water Act supplies a federal remedy to what is essentially a State problem. Under the Act it is the States which establish the water quality standards with which all discharges of pollution must comply. 33 U.S.C. 1313; 1311(b)(1)(C). The statute states that it "is the policy of the Congress to recognize, preserve, and protect the primary responsibility and rights of States to prevent, reduce and eliminate pollution. . . ." 33 U.S.C. (Supp. II) 1251(b). It cannot be argued that Congress has expressed a desire to oust State law and apply uniform federal rights and duties. Compare *Textile Workers' Union of America* v. *Lincoln Mills,* 353 U.S. 448 (1957).

In the Marine Protection Act, Congress has either incorporated applicable State water quality standards by reference or authorized federal officials to develop surrogate standards for ocean waters outside the jurisdiction of the coastal States. Implied property rights have no place in the scheme of the statute or under the statutory and international law which govern the high seas.

POINT II

CONGRESS HAS DETERMINED THAT STATE COMMON LAW, NOT FEDERAL, IS TO PROVIDE THE RULE OF DECISION FOR TORTS OCCURRING IN THE TERRITORIAL WATERS OF THE UNITED STATES AND THAT THE UNITED STATES WOULD NOT ASSERT GENERAL JURISDICTION OVER OCEAN WATERS ADJACENT TO TERRITORIAL WATERS. NO BASIS EXISTS FOR THE CREATION OF A FEDERAL COMMON LAW NUISANCE CLAIM FOR OCEAN POLLUTION ASSERTABLE BY PRIVATE PARTIES.

Although pollution flows freely from international waters into territorial waters and vice-versa, federal statutes and international law treat differently those activities occurring within the nation's territorial waters and those occurring outside them. The legal analysis set forth below follows this distinction and the two geographical areas are treated separately.

A. Federal Common Law In State Territorial Waters

In the Submerged Lands Act of 1953, 43 U.S.C. 1301-1315, Congress provided that the individual States would exercise jurisdiction over the lands and waters lying three miles seaward of the coastline. 43 U.S.C. 1311. Hence whatever rule is applicable to the nation's internal waterways applies to ocean pollution in the three mile ocean belt. We will show below that

it has long been established that no federal common law nuisance action is maintainable by private parties for pollution occurring in the nation's internal waters.

In *Willamette Iron Bridge Co.* v. *Hatch,* 125 U.S. 1 (1888), this Court held that a private citizen could not challenge a nuisance in a navigable waterway under the "federal common law." In *Willamette* a property owner sued to prevent the construction of a bridge which would have impeded boat access to his property which bordered a navigable waterway. This Court dismissed the suit, stating:

> The power of Congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, is not questioned. But until it does pass some such law, there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers, unless it be the maritime law, administered by the courts of admiralty and maritime jurisdiction. No precedent, however, exists for the enforcement of any such law. . . . Such obstructions and nuisances are offenses against the laws of the States within which the navigable waters lie, and may be indicated or prohibited as such; but they are not offenses against United States laws which do not exist; and none such exist except what are to be found on the statute book. 125 U.S. at 8.

While *Willamette* concerned an intrastate bridge, the Court made it clear that it was the private character of the parties and the non-sovereign interests they represented which precluded relief under federal common law or maritime law. The Court noted (at 125 U.S. 13-14) that if this nuisance interfered with the operations of the federal government, it would indeed have been actionable.

Willamette Iron Bridge was one of a long series of cases denying private parties the right to challenge under federal common law bridges or other obstructions of navigable waterways. See cases cited in *Willamette* at 125 U.S. 8-9; see also

Darling v. *City of Newport News,* 249 U.S. 540, 542-43 (1919) (holder of land under state tidal waters had no federal claim relating to damages sustained to fishing business by municipal discharge of sewage into those waters). The decision reflected the well-settled view that in the federal system the States were the proper entities to define primary legal obligations among private parties asserting conflicting rights. As stated in *Gilman* v. *Philadelphia,* 3 Wall. (70 U.S.) 713, 729 (1865), cited in *Willamette Iron Bridge:*

> It is for the municipal power to weigh the considerations which belong to the subject [of determining whether bridge traffic or river traffic shall have priority]. The States have always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases to the paramount authority of Congress [over commerce].

Gilman and the other cases relied upon in *Willamette* are part of a settled federal judicial tradition that, in the absence of Congressional action, there is no federal common law to protect the property rights of citizens either civilly (see *Wheaton* v. *Peters,* 8 Pet. (33 U.S.) 591, 658 (1834) (author who had not complied with federal copyright statute had no federal common law right protecting his works from reproduction)) or criminally (see *United States* v. *Hudson,* 7 Cranch (11 U.S.) 32 (1812); *United States* v. *Coolidge,* 1 Wheat. (14 U.S.) 415 (1816) (federal courts have no jurisdiction over common law crimes)).[10] These rights are defined and protected by State law.

The principles applied in *Wheaton* v. *Peters, supra,* are particularly appropriate to the present action. There the plain-

---

10 See generally Warren, *New Light on the Federal Judiciary Act of 1789,* 37 Harv. L. Rev. 49, 73 (1923); Bator, Mishkin, Shapiro, Wechsler, *Hart and Wechsler, The Federal Courts and the Federal System* (2nd ed. 1973) 1262-65.

tiff sought the protection of federal common law to prevent unfair competition from another publisher who was printing copies of court decisions which the plaintiff had compiled. The plaintiff in *Wheaton* v. *Peters,* like the plaintiffs in the case at bar, had not complied with the statutory prerequisites to assert a claim under the federal copyright statutes. Even though the Constitution gave Congress the power to enact laws for the protection of authors' works, the Court refused to fashion a federal common law remedy and instead looked to Pennsylvania law to ascertain the plaintiff's rights.

The perspective of *Wheaton* v. *Peters* and *Willamette Iron Bridge* that state law is the basic source of property rights in the federal system has not changed in spite of the increasingly frequent use of Congressional power to determine the conduct of persons whose activities affect commerce. Unless Congress has otherwise acted, it is state common law, not federal, which defines property rights and supplies the rules of conduct even for parties engaged in interstate commerce. See, *e.g., Miree* v. *DeKalb County,* 433 U.S. 25, 31-33 (1977); *Wallis* v. *Pan American Petroleum Corp.,* 384 U.S. 63 (1966); *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938); *cf. Perry* v. *Sinderman,* 408 U.S. 593, 604 (1972).

Congress's response to the decision in *Willamette Iron Bridge* was the enactment of the predecessor statute to section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403.[11] See generally *United States* v. *Pennsylvania Industrial Chemical Corp.,* 411 U.S. 655, 663 (1973); *United States* v. *Republic Steel Corp.,* 362 U.S. 482, 488 (1960). No private rights were created. Both in the original enactment and in the later codifications enforcement is limited by its terms to actions brought by the United States Attorneys. 25 Stat. 425; 33 U.S.C. 413. See *Red Star Towing & Transportation Co.* v. *Dept. of Transportation,* 423 F.2d 104, 105 (3rd Cir. 1970); *Connecticut*

---

11 The original enactment was Act of August 11, 1888, c. 860, § 9, 25 Stat. 424, and provided for the removal of obstructions at the demand of the Secretary of War.

Action Now, Inc. v. *Roberts Plating Co.*, 457 F.2d 81, 90 n.16 (2nd Cir. 1972); *Guthrie* v. *Alabama By-Products Co.*, 328 F. Supp. 1140, 1147 (N.D. Ala. 1971).

Congress's refusal to create private rights when it responded to *Willamette Iron Bridge* should not be overruled by creation of the very common law right rejected in *Willamette*. Certainly such private federal rights cannot be based upon the decision in *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), relied upon by the court of appeals in the instant case. *Illinois* v. *Milwaukee* held that "federal common law" would be applied to determine the rights of a plaintiff State which claimed that citizens of another State were unreasonably polluting interstate waters. The Court reasoned that this common law was a "law" within the meaning of 28 U.S.C. 1331—hence the claim "arose under" federal law and was cognizable in the District Courts.

All of the cases relied upon in *Illinois* v. *Milwaukee* supporting the proposition that the federal common law was a "law" for adjudicating disputes under 28 U.S.C. 1331 involved claims by a State that its sovereign interests were being infringed upon by activities of persons in another State. In *Illinois* this Court quoted extensively from *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907), where the necessity behind development of a federal common law of nuisance was enunciated—that in the absence of statutory rules, a forum given authority to peacefully adjudicate disputes between formerly sovereign states must develop rules of decision to decide the competing claims.

The power given to the district courts in *Illinois* v. *Milwaukee* to adjudicate controversies under the federal common law is derivative from, and no greater than, the Supreme Court's power to adjudicate disputes in which a State is a party plaintiff. That power does not extend to private parties unless the Supreme Court's original jurisdiction to adjudicate claims in which a State is a party plaintiff extends to claims brought by private parties asserting their sovereign's claims. But clearly it does not. This Court has refused to allow intervention by

parties raising claims under a theory that they had cognizable interests their sovereigns did not represent. See, *e.g.*, *New Jersey* v. *New York*, 345 U.S. 369, 373 (1953); *Kentucky* v. *Indiana*, 281 U.S. 163, 171 (1930). Compare *Darling* v. *City of Newport News*, *supra*, 249 U.S. 540 (1919) with *Georgia* v. *Tennessee Copper*, *supra*, 206 U.S. 230 (1907). Similarly, this Court has not permitted its original jurisdiction to be invoked even by a State to assert or protect the individual rights of its citizens. See, *e.g.*, *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 665 (1976); *New Hampshire* v. *Louisiana*, 108 U.S. 76 (1883). The plaintiff must be a State and the dispute must involve an allegation of infringement of the State's sovereign interests in order for *Illinois* v. *Milwaukee* to apply.[12]

The common law applied in cases brought by a State under 28 U.S.C. 1331 reflects the entitlement the Constitution grants States not to have their sovereignty unreasonably infringed. As stated in *Kansas* v. *Colorado*, 206 U.S. 46, 98 (1907), "through these successive disputes and decisions the Court was practically building up what may not improperly be called interstate common law." This law has no counterpart in the common law applied in the courts of the individual States to adjudicate disputes among private parties. *Missouri* v. *Illinois*, 200 U.S. 496, 520 (1906). Hence the fact that some common law jurisdictions grant a right of action to private parties (such as fishermen) who allege "special injury" from torts categorized as public nuisances[13] has no persuasive value here. The logic of

---

12 Hence, the statement in footnote 6 in *Illinois* v. *Milwaukee*, 406 U.S. at 105, that "it is not only the character of the parties that requires us to apply federal law," did not mean that the problem of interstate pollution alone would support federal question jurisdiction, but that the presence of States as parties in conjunction with a claim of interstate pollution would warrant such a suit. Footnote 6 cites, *inter alia*, *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 289 (1988)—a case (*and page*) standing for the proposition that the Supreme Court's original jurisdiction does not extend to monetary claims brought by a State against a citizen of another State.

13 See Prosser, *Private Action For Public Nuisance*, 52 Va. L. Rev. 997, 1013-1014 (1966); *Union Oil Co.* v. *Oppen*, 501 F.2d 558 (9th Cir. 1974).

the rules of decision applied in suits between sovereign states has a different basis from that applied in traditional common law suits. As stated in *Kansas* v. *Colorado,* 185 U.S. 125, 146 (1902):

> Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law as the exigencies of the case may demand.

See also *Connecticut* v. *Massachusetts,* 282 U.S. 660, 670 (1931); *North Dakota* v. *Minnesota,* 263 U.S. 365, 374 (1923). See generally, Note, *The Original Jurisdiction of the United States Supreme Court,* 11 Stan. L. Rev. 665, 680-85 (1959).[14] And principles of international law do not permit individuals the right to assert their sovereign's rights in a nuisance action. W. Bishop, *International Law* 463 (3d ed. 1971).

Nor does the interstate nature of pollution in the territorial seas mandate the creation of a federal common law to determine the rights of competing users of these waters. All interstate commerce has interstate consequences. Yet Congress has not deemed it necessary that torts occurring in the stream of commerce—nor even those arising from the operation of interstate carriers—be governed by a uniform body of federal tort law. See generally *Erie R.R. Co.* v. *Tompkins, supra.*

A lawsuit brought under state law is an available remedy to an individual unable to persuade his State that a suit under federal common law is necessary to protect its sovereign in-

---

14 Indeed to rule that federal common law authorizes individuals to bring federal common law nuisance actions on the basis of *Illinois* v. *Milwaukee* would be, as Professor Currie has noted, bootstrapping:

> In one respect *Milwaukee* goes beyond even *Swift* v. *Tyson,* for in *Swift* it was possible to argue that the powers to create federal law was implicit in the grant of diversity jurisdiction, while in *Milwaukee* the District Courts' jurisdiction existed only if there was federal common law.

Currie, *Federal Courts, Cases and Materials* (2nd ed. 1974) 882.

terests in the territorial seas. State law is competent to cope with water pollution (or indeed any other tort) originating in another State or on the high seas affecting an individual's property. See *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973) (upholding the validity of a Florida statute imposing strict liability for damages resulting from an oil spill by any ship destined for or leaving a Florida oil transfer station). Either federally mandated pollution limitations—which incorporate state water quality standards (see Point III, *infra*)—will govern the determination of what is reasonable conduct, or conflicts principles will determine whether the law of the State in which the injury occurs, or the law of the jurisdiction in which the pollution originates, governs the action. See *Ohio* v. *Wyandotte Chemical Corp.*, 401 U.S. 493, 498-99 n.3 (1971). And the commerce clause will prevent States from imposing unreasonable water quality standards on their neighbors.

While the federal courts have developed non-statutory rules of decision in areas where adjudication of disputes in which the sovereign interests of the States have not been implicated—see generally, Friendly, J., *In Praise of Erie—and of the New Federal Common Law,* 39 New York Univ. L. Rev. 383 (1964)—these holdings will not support creation of a federal common law nuisance action for ocean pollution brought by private parties under 28 U.S.C. 1331. The courts have applied federal common law rules of decision either by explicit direction from Congress (see, *e.g., D'Oench Duhne & Co.* v. *Federal Deposit Ins. Corp.*, 315 U.S. 447, 467-75 (1942) (Jackson, J., concurring)), or because the federal courts had been granted specific jurisdiction to adjudicate the particular dispute and the subject matter was so suffused with federal policy that only a uniform federal rule would effectuate national policy. See, *e.g., Clearfield Trust Co.* v. *United States,* 318 U.S. 363 (1943); *Textile Workers Union* v. *Lincoln Mills, supra,* 353 U.S. 448 (1957). Federal jurisdiction did not exist in these cases because federal common law supplied the rule of decision; common law was applied because jurisdiction otherwise existed

and there was a necessity to fashion uniform federal rules to fill in the interstices of a federal statutory program. One commentator has stated the rule as follows:

> Thus, we see that, even though there may be no common law as a source of jurisdiction in the federal courts, there can nevertheless exist, as a means of exercising jurisdiction already conferred, a federal common law in the sense of a body of non-statutory rules independently announced and administered by those tribunals.

Von Moschzisker, R., *Common Law and Our Federal Jurisprudence,* 74 U. Pa. L. Rev. 109, 270, 367 at 117 (1925).

Even when federal policies are paramount, if a federal entitlement or liability cannot fairly be said to have been clearly implied by Congress, this Court has denied the existence of a federal remedy. See *United States* v. *Standard Oil Co. of California,* 332 U.S. 301 (1947), where the Court refused to create a common law right in the United States for the medical expenses it incurred in treating a soldier run over by a negligently driven truck. See also *Wheeldin* v. *Wheeler,* 373 U.S. 647 (1965). And, as we demonstrated in Point I, *supra,* Congress evidenced no intent to create private federal entitlements or liabilities in the field of water pollution.

B. Federal Common Law Outside the Territorial Waters of the United States

The first general assertion of United States jurisdiction over the geographical area beyond the three-mile limit was President Truman's proclamation of September 28, 1945 (Exec. Proc 2667, 59 Stat. 884). The proclamation cited general United States dominion and power over the mineral resources of the outer continental shelf, and also affirmed the waters above the shelf as high seas. The extent of federal control in the three-mile belt of the outer continental shelf adjacent to the coasts was delineated in *United States* v. *California,* 332 U.S. 19 (1947). This Court decreed that federal dominion included

control over the lands and minerals underlying the ocean waters. The Court outlined the history of federal legislative and executive pronouncements in the area,[15] 332 U.S. at 33-37, and held that the assertion of national dominion by the executive and legislative branches of government over any particular territory was binding on United States courts.

In response to this decision and the need to demarcate property rights in the outer continental shelf, Congress in 1953 passed two statutes which set forth the basic legal framework for the governance of activities in this geographical area: The Submerged Lands Act of 1953, *supra,* 43 U.S.C. 1301-1315; and the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. (1976) 1331-1343, 67 Stat. 462-470, as amended by Pub. L. 95-372, Title II, 92 Stat. 632 (1978), 43 U.S.C. (Supp. II) 1331-1356. These two statutes may be described as "constitutional" in that they (and applicable treaties) provide the basic legal framework for the scope of American jurisdiction in the outer continental shelf and the waters over the shelf.

As noted above, the Submerged Lands Act granted the respective coastal states jurisdiction and management of the lands and natural resources in the waters of the three-mile belt adjacent to their shores. 43 U.S.C. 1311(a). State law was provided as the applicable law of these areas. In the Outer Continental Shelf Lands Act, however, Congress took a different approach, and carefully preserved the character of the waters seaward of the States' territorial waters as high seas. Congress provided that the subsoil and seabed of the shelf were subject to the jurisdiction of the United States, 43 U.S.C. (1976) 1332(a), and that the civil and criminal laws of the respective adjacent States—except as preempted by Congress—would apply to the subsoil, seabed, and the artificial islands and structures built thereon. 43 U.S.C. (1976) 1[illegible].[16] But

---

15 See also Heinzen, *The Three Mile Limit: Preserving the Freedom of the Seas,* 11 Stan. L. Rev. 597, 613-629, esp. at notes 112-114 (1959).

16 The state law applied is a species of "federal common law." See *Rodrigue* v. *Aetna Casualty & Surety Co.,* 395 U.S. 352 (1969).

Congress explicitly provided that the waters over the seabed were outside the jurisdiction asserted. 43 U.S.C. (1976) 1332(b). This provision was included to make "abundantly clear the unequivocal legislative intent" that the jurisdiction asserted was "horizontal jurisdiction" and did not affect the status of the superadjacent waters as international waters. Sen. Rep. No. 411, 83rd Cong., 1st Sess., at 2 (1953).[17] Parallel provisions were enacted in extensive 1978 amendments. See 43 U.S.C. (Supp. II) 1332 subd. (1) and (2); 1333(a).

The federal district courts were given jurisdiction over cases and controversies arising from the development of natural resources of the subsoil and seabeds. 43 U.S.C. (1976) 1333(b). A similar provision was reenacted in the 1978 amendments to the Outer Continental Shelf Lands Act, 43 U.S.C. (Supp. II) 1349(b)(1). In addition, the 1978 amendments contain a citizen suit provision authorizing any person "having a valid legal interest" to institute an action to compel compliance with the Act. 43 U.S.C. (Supp. II) 1349(a)(1). The amendments also authorize "any resident of the United States who is injured in any manner" through the failure of an offshore mineral operator to comply with any requirement of the subchapter to bring a civil action for damages.[18] 43 U.S.C. (Supp. II) 1349(b)(2). The 1978 amendments again reasserted the character of these waters as high seas. 43 U.S.C. (Supp. II) 1332(2).

These statutory provisions clearly indicate that Congress has not asserted general jurisdiction over conduct on the high seas contiguous to United States territorial waters. The district courts were not even given general jurisdiction over all cases arising in the geographical area: specific types of cases were enumerated. These statutes do not impliedly authorize creation of a general common law applicable to the seas. See generally

---

17 See Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier,* 6 Stan. L. Rev. 2334 (1953).

18 The legislative history of these amendments is set forth at 1978 U.S. Code Cong. & Adm. News 1450; these specific provisions are detailed at pp. 1566-1568, 1679-80; and 1710-13.

Treasure Salvors Inc. v. *Abandoned Sailing Vessel,* 569 F.2d 330 (5th Cir. 1978) (holding that under the Outer Continental Shelf Lands Act the federal government has asserted general jurisdiction over minerals, but not general sovereignty over the area). Congress has carefully crafted the private rights it wishes to create and protect in this area, and has stated explicitly the legal interests it wishes to protect. A right of action has been given for damages arising from mineral exploration activities in violation of federal law; state law applies to determining other rights flowing from mineral exploration; but no general right to be free from ocean pollution has been authorized. *Expressio unius.*

Any doubt as to the intent of Congress in not asserting territorial powers over these areas is resolved by the provisions of two treaties[19] to which the United States is a signatory. The first of the treaties to become effective was the Convention on the High Seas (T.I.A.S. 5200, [1962] 13 U.S.T. (pt. 2) 2313), which became effective on September 30, 1962. It provides (Article 2) that no nation may assert sovereignty outside its territorial waters except in limited instances not relevant here.[20] See generally *United States* v. *Louisiana,* 394 U.S. 11, 23 n.26 (1969).

The second convention to become effective was the Convention on the Territorial Sea and the Contiguous Zone (T.I.A.S. No. 5639, [1964] 15 U.S.T. (pt. 2) 1607). This Convention provides for national sovereignty over the "territorial seas" (Article 1) (without defining territorial seas), and provides for a "contiguous zone" of limited national sovereignty (Article 24). The contiguous zone may not extend beyond twelve miles from the landward edge of the nation's territorial waters. The coastal nation may exercise that control of activities in the contiguous

---

19 A third treaty which regulates ocean dumping is described at p. 8, *supra.*

20 Article 22 (piracy); Article 23 (hot pursuit of ships believed to have violated laws in nation's territorial waters).

zone necessary for preventing infringement of "customs, fiscal, immigration or sanitary regulations within its territory or territorial sea." *Id.*

Although these conventions do not impair Congressional authority to regulate pollution emanating from American sources on the high seas, and although they do not impair Congressional authority to regulate pollution-related activities of foreign nationals in the contiguous zone which affect this country's interests, any general expression of national sovereignty in the contiguous zone is inconsistent with them. An assertion by the courts of one nation to regulate conduct in any particular geographical area has traditionally been viewed as an expression of sovereignty. Cf. *United States* v. *Louisiana, supra,* 394 U.S. 25-27; *United States* v. *California,* 381 U.S. 139, 174-175 (1965).

Moreover, the creation of a United States common law would have consequences on international law itself, for international law is a reflection of the generalized practices of individual nations. Bishop, *International Law, supra,* 30-33; Schwarzenberger, *The Dynamics of International Law* 6-7 (1976). Congress should make the ultimate decision as to how to shape international law in this area.[21]

Even apart from the statutes and conventions, we also note that United States domestic law has traditionally not been applied to activities outside the three-mile limit. For example, in *Cunard Steamship Co.* v. *Mellon,* 262 U.S. 100, 123 (1923), this Court refused to extend the eighteenth amendment to domestic merchant ships outside the territorial waters of the United States. The scope of legislation is "presumptively territorial," *Sandberg* v. *McDonald,* 248 U.S. 185, 195 (1918); *United States* v. *Perez-Herrera,* 610 F.2d 289, 290 (5th Cir. 1980). So ought to be the federal common law. And even in

---

21 If federal common law rights assertable by private parties are authorized, *quaere* whether Canadian interests could challenge activities allegedly creating "acid rain."

federal territories a general federal common law has not been applied. Private rights in areas over which the government has acquired exclusive federal jurisdiction have been determined under the principle that, upon cession of territory, the laws existing at the time of cession remain in force until changed by the new sovereign. See *Stewart & Co.* v. *Sadrakula,* 309 U.S. 94, 100 (1940); *Chicago, R.I. & Pac. Ry.* v. *McGlinn,* 114 U.S. 542, 547 (1885); *Hart and Wechsler, The Federal Courts and the Federal System, supra,* p. 17 n.10, at 1268.

Congress has expressed the limited extent of United States sovereignty over the oceans seaward of the three mile limit in the numerous regulatory statutes it has passed. These statutes are listed in the margin.[22] The complex interplay among these

---

22 In addition to the Outer Continental Shelf Lands Act which provides for damages arising from oil spills arising from drilling, the Federal Water Quality Improvement Act of 1970, 33 U.S.C. (1970) 1161 authorized the federal government to clean up oil spills from tankers and imposed strict liability on dischargers within certain limits. These limits were raised in the 1977 amendments to the Clean Water Act. The Port and Water Safety Act of 1972, 33 U.S.C. (1976) 1221-27, as amended by the Port and Tanker Safety Act of 1978, 33 U.S.C. (Supp. II) 1221-27 regulates the navigational devices and rules of ships in and adjacent to United States waters; the Intervention on the High Seas Act of 1974, 33 U.S.C. (1976) 1471-87 authorizes federal intervention in marine catastrophes on the high seas which threaten United States coastlines or the natural resources of the seas. The Marine Protection Act, directly involved in this lawsuit, governs the dumping of virtually any pollutant by a United States vessel under a permit system carefully weighing all environmental impacts; similarly the Clean Water Act governs the discharge of all pollutants from all points sources into the navigable waters. Federal jurisdiction over most living creatures existing in the fishery conservation zone (a 197 mile belt of water seaward of the territorial sea) was established in 1976 by the Fishery Conservation and Management Act of 1976, 16 U.S.C. 1811-1813. Marine mammals and endangered species within the fishery conservation zone were subjected to federal jurisdiction by the Marine Mammal Protection Act of 1972, 16 U.S.C. 1362(15), 1372(a), and the Endangered Species Act of 1973, 16 U.S.C. 1538(a). The Secretary of Commerce is authorized by this Act to preempt regulation of fisheries within the territorial seas, 16 U.S.C. 1856(6), and, to designate marine sanctuaries for preserving or restoring ocean waters overlying the outer continental shelf and the Great Lakes. 16 U.S.C. 1432(a). Such a designation

statutes is set forth in some detail in *Commonwealth of Massachusetts* v. *Andrus,* 594 F.2d 872 (1st Cir. 1979). To provide an overlay of federal common law in this heavily regulated area would allow parties asserting particular interests to bypass the political process and the regulatory mechanisms Congress has set forth. Oil leasing, mineral exploration, dredging activities *et al.* could all be enjoined on the grounds that the federal regulator provided insufficient protection to the plaintiff's interests. The City of New York's sewerage activities affecting the ocean are all regulated by federal law and respondents may participate in the formulation of regulations governing them. But Congress has not provided for common law jurisprudence in this area.

We do not imply that pollution in the high seas affecting a State's sovereign interests is beyond the scope of a common law nuisance action brought by a State, *Illinois* v. *City of Milwaukee, supra* (unless that common law has been preempted; see Point III, *infra*). In addition, pollution reaching state territorial waters may be subject to the inherent police power of the States and to the water quality standards they promulgate under the Clean Water Act. See *Askew* v. *American Waterways Operators, supra,* 411 U.S. 325. Similarly, ocean pollution affecting the sovereign interests of the United States government may perhaps be actionable by the government, either pursuant to its inherent authority to regulate maritime affairs, and interstate and foreign commerce (see generally *New Jersey* v. *New York City,* 283 U.S. 473 (1931)).But as we noted above, the existence of this right of action in the sovereign does not imply that it is maintainable by private parties.

---

severely limits the jurisdiction of either States or other federal agencies. See generally *Commonwealth of Massachusetts* v. *Andrus,* 594 F.2d 872 (1st Cir. 1979). The Secretary has not exercised his authority in the areas which are the subject of this lawsuit. In the Coastal Zone Management Act, 16 U.S.C. (1976 & Supp. II 1978) 1451-1464, Congress required the Secretary of Commerce to approve state "coastal zone management programs" that meet certain requirements. 16 U.S.C. (1976) 1454, 1455. Once a program has been approved, federal agencies must determine that their activities affecting the state's coastal zone are consistent with the program. 16 U.S.C. 1456(1)(1)-(2).

POINT III

THE CLEAN WATER AND THE MARINE PROTECTION ACTS PRESENT A COMPREHENSIVE SCHEME FOR THE ACHIEVEMENT OF LEVELS OF WATER QUALITY WHICH PROTECT STATE SOVEREIGN INTERESTS AND THE PUBLIC HEALTH AND WELFARE. THE STATUTORY SCHEME LEAVES NO ROOM FOR THE DEVELOPMENT OF COMMON LAW STANDARDS OF ACCEPTABLE LEVELS OF POLLUTION OR WATER QUALITY.

Under the Clean Water Act, discharges of pollution into navigable waters are permitted if they comply with federal and state effluent limitations and if they do not result in a violation of either state or federal water quality standards. 33 U.S.C. 1311(b)(1)(C); 1342(k). States have broad discretion in establishing their water quality standards, and, hence, in determining what levels of effluent reduction, beyond minimum federal technology-based limitations, must be employed. 33 U.S.C. 1313. The federal government also has powers over the quality of marine waters. 33 U.S.C. 1343. See pp. 4-6, *supra*.

The Marine Protection Act authorizes dumping from vessels only if the Administrator determines that the resulting pollution will not unreasonably degrade or endanger human health, welfare or the marine environment or violate applicable water quality standards. 33 U.S.C. 1412(a). Under current regulations EPA will not even issue a permit if the applicant fails to show a need for the dumping and lack of alternative means of disposal. 40 C.F.R. 227.2(a).

Under this regulatory scheme, there is no room for a federal common law of nuisance. The gaps and inadequacies of interstate pollution law identified in *Illinois* v. *City of Milwaukee*, *supra*, 406 U.S. 91, as requiring development of federal common law to adjudicate disputes impinging upon State sovereignty have been dealt with by federal statutes and regulations. The traditional standards applied in common law public

nuisance actions have been transferred from the Courts to federal and state officials for determination. In saving common law remedies, Congress did not preclude federal judges from deferring to agency expertise disputes concerning the proper method of pollution and control and sewage technology, and proper standards of water quality.

The Clean Water and Marine Protection Acts provide an explicit remedy for States to protect themselves from extra-territorial pollution. A State can determine for itself what level of water quality it wishes maintained. The Clean Water Act provides that water quality standards

> be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial and other purposes, and also taking into account their use and value for navigation. 33 U.S.C. 1313(c)(2).

By delegating this broad authority to the States; by mandating that all discharges and dumping from vessels be such as to comply with state and federal water quality standards, 33 U.S.C. 1311(b)(1)(C) and 1412(a); by mandating that a permittee certify compliance with State standards, 33 U.S.C. 1341(a)(2); and by authorizing State intervention into the permit issuance process of another State when a receiving State's water quality standards may be affected, 33 U.S.C. 1342(b)(3) and (b)(5), Congress has provided a statutory mechanism to protect the unprotected sovereign interests identified in *Illinois* v. *Milwaukee*.

The logic to be applied in determining statutory preemption of federal common law does not differ substantially from the logic of federal preemption of state police powers. Compare *Arizona* v. *California*, 373 U.S. 546 (1963) with *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 164-165 (1978). The Congressional

mandate in both instances represents the supreme sovereign's determination of the manner in which members of the public shall conduct their activities. The legislative standards of conduct and water quality incorporated into the federal permits represent the sovereign police power which is the heart of public nuisance law. See Prosser, *supra,* 52 Va. L. Rev. at 997. The federal permitting procedures implement substantive federal and state rules developed to achieve the objects of the federal common law of nuisance. Non-statutory standards are superseded.

The district courts should not be available, at the behest of private parties or State legal officers, to grant *de novo* review of the judgment of federal and State officials as to the proper levels of water quality and methods of control in federal common law nuisance actions. Once federal and State officials have determined acceptable levels of water quality, once federal officials have determined that alternatives not be employed after considering the broad array of Congressionally mandated criteria, the legislative and political judgments of the responsible officials should be respected.

We are not arguing here that compliance with federal technology-based effluent limitations acts in itself as a shield from damages that state common law imposes upon a polluter. Rather, we are arguing that compliance with a permit under these statutes precludes a finding by a federal court under federal common law that a State's sovereign interests are being unreasonably infringed, or that the acts of pollution involved unreasonably degrade water quality or unreasonably infringe on public rights. In the Clean Water Act Congress has mandated that the States define what level of water quality protects the public welfare; citizens of those States and citizens of other States should be bound by the sovereign's determination. If a polluter's actions impose costs on others, the injured party may seek redress under state common law if it imposes such a liability, or from his legislature to reduce the amount of pollution that its officials have deemed acceptable. In the Marine Protection Act, federal officials have been given

authority to define acceptable levels of water quality in the oceans, and to weigh the need for the dumping in light of its environmental impact and the availability of alternatives. Precluding private parties from challenging the official judgment that, in light of these criteria, a given amount of pollution is not unreasonable would do no harm to the statutory scheme.

The critical question to be employed in a common law public nuisance action is determining what conduct constitutes an "unreasonable" interference with the public's rights.[23] The discharges involved in the case at hand cannot be deemed unreasonable either in and of themselves or in light of their impact. Under the common law no one user of the public's rights has priority over others. Pollution from municipal sewage treatment operations is not in and of itself unreasonable because it interferes with fishing. Sewage must be disposed of in some manner, and if the only known way is to use the oceans, there is no prima facie tort. See *Darling* v. *City of Newport News, supra,* 249 U.S. 540 (1919); *New York* v. *New Jersey,* 256 U.S. 296 (1921); and see cases collected in *Moore* v. *Hampton Roads Sanitation Commission,* 557 F.2d 1030, 1033 (4th Cir. 1977). The question is whether the means chosen are unreasonable or have an unreasonable impact. But in granting the city a permit to engage in the challenged conduct, federal and state officials have determined that the pollution in issue here is not unreasonable. Their balancing of competing needs and their judgment as to what are acceptable levels of water quality are virtually identical to that which would be employed in the common law tort action. Cf. *Forrester* v. *Consumer Product Safety Comm'n,* 559 F.2d 774, 789 (D.C. Cir. 1977); *Aqua Slide 'N' Dive Corp.* v. *Consumer Product Safety Comm'n,* 569 F.2d 831, 839 (5th Cir. 1978).

We do not question the power of Congress to create a regulatory scheme which delegates to state and federal officials the authority to determine what levels of water quality would

---

23 See Prosser, *supra* p. 20, n.13, 52 Va. L. Rev. at 1003; see also W. Prosser, *Law of Torts* (4th ed. 1971), 576-577.

be deemed reasonable and allow, at the same time, for parties to attempt to persuade federal judges in common law actions that the officially sanctioned levels of pollution were unreasonable. But such an approach would be wasteful, duplicative, and in conflict with traditional notions of deference to the officials upon whom Congress has placed the responsibility of carrying out its will. The regulations which govern ocean pollution implement a highly complex and technical statute. Every discharge from every point source must have a permit reflecting applicable regulations. The Administrator is given discretion to make legislative, policy-type judgments. See *Ethyl Corp.* v. *E.P.A.*, 541 F.2d 1, 34 (D.C. Cir.) (en banc), *cert. den.* 426 U.S. 941 (1976). If the Administrator determines that elimination of a given pollutant is not necessary to meet water quality standards applicable under 33 U.S.C. 1311(b)(1), or that elimination of a pollutant is not practicable under 33 U.S.C. 1281(g)(2)(a), his determination reflects the legislative judgment. The absence of a particular control methodology does not mean an absence of Congressional policy. Traditional standards of review should not be circumvented by common law actions that amount to collateral attacks on discretionary agency decisions.

When Congress protected common law remedies by enacting a savings clause in the citizen suit provisions of these statutes, it did not have before it a developed body of federal common law governing pollution of interstate waters. See *Wyandotte Transportation Co.* v. *United States,* 389 U.S. 191, 196, n.5 (1967). It is not unreasonable to conclude that Congress intended to save state common law remedies, and not an inchoate body of federal common law. See *Committee for Jones Falls Sewage System* v. *Train,* 539 F.2d 1006, 1009 n.9 (4th Cir. 1976). See also pp. 12-13, *supra.*

CONCLUSION

Petitioners City of New York and Beame respectfully request that the judgment of the Court of Appeals be reversed and that the case be remanded with directions to dismiss the complaint herein.

Respectfully submitted,

ALLEN G. SCHWARTZ
Corporation Counsel
of the City of New York
Attorney for Petitioners
City of New York and Beame

December 4, 1980

LEONARD KOERNER,
STEPHEN P. KRAMER,
of Counsel.

APPENDIX

Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. 1401-1412a:

§ 1401. Congressional finding, policy, and declaration of purpose

(a) Unregulated dumping of material into ocean waters endangers human health, welfare, and amenities, and the marine environment, ecological systems, and economic potentialities.

(b) The Congress declares that it is the policy of the United States to regulate the dumping of all types of materials into ocean waters and to prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities.

(c) It is the purpose of this chapter to regulate (1) the transportation by any person of material from the United States and, in the case of United States vessels, aircraft, or agencies, the transportation of material from a location outside the United States, when in either case the transportation is for the purpose of dumping the material into ocean waters, and (2) the dumping of material transported by any person from a location outside the United States, if the dumping occurs in the territorial sea or the contiguous zone of the United States.

§ 1402. Definitions

For the purposes of this chapter the term—

(a) "Administrator" means the Administrator of the Environmental Protection Agency.

(b) "Ocean waters" means those waters of the open seas lying seaward of the base line from which the territorial sea is measured, as provided for in the Convention on the Territorial Sea and the Contiguous Zone (15 UST 1606; TIAS 5639).

(c) "Material" means matter of any kind or description, including, but not limited to, dredged material, solid waste, incinerator residue, garbage, sewage, sewage sludge, munitions, radiological, chemical, and biological warfare agents, radioactive materials, chemicals, biological and laboratory waste, wreck or discarded equipment, rock, sand, excavation debris, and industrial, municipal, agricultural, and other waste; but such term does not mean sewage from vessels within the meaning of section 1322 of this title. Oil within the meaning of section 1321 of this title shall be included only to the extent that such oil is taken on board a vessel or aircraft for the purpose of dumping.

(d) "United States" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone, the territories and possessions of the United States, and the Trust Territory of the Pacific Islands.

(e) "Person" means any private person or entity, or any officer, employee, agent, department, agency, or instrumentality of the Federal Government, of any State or local unit of government, or of any foreign government.

(f) "Dumping" means a disposition of material: *Provided,* That it does not mean a disposition of any effluent from any outfall structure to the extent that such disposition is regulated under the provisions of the Federal Water Pollution Control Act, as amended under the provisions of section 407 of this title, or under the provisions of the Atomic Energy Act of 1954, as amended, nor does it mean a routine discharge of effluent incidental to the propulsion of, or operation of motor-driven equipment on, vessels: *Provided further,* That it does not mean the construction of any fixed structure or artificial island nor the intentional placement of any device in ocean waters or on or in the submerged land beneath such waters, for a purpose other than disposal, when such construction or such placement is otherwise regulated by Federal or State law or occurs pursuant to an authorized Federal or State program: *And provided further,* That it does not include the deposit of

oyster shells, or other materials when such deposit is made for the purpose of developing, maintaining, or harvesting fisheries resources and is otherwise regulated by Federal or State law or occurs pursuant to an authorized Federal or State program.

(g) "District court of the United States" includes the District Court of Guam, the District Court of the Virgin Islands, the District Court of Puerto Rico, the District Court of the Canal Zone, and in the case of American Samoa and the Trust Territory of the Pacific Islands, the District Court of the United States for the District of Hawaii, which court shall have jurisdiction over actions arising therein.

(h) "Secretary" means the Secretary of the Army.

(i) "Dredged material" means any material excavated or dredged from the navigable waters of the United States.

(j) "High-level radioactive waste" means the aqueous waste resulting from the operation of the first cycle solvent extraction system, or equivalent, and the concentrated waste from subsequent extraction cycles, or equivalent, in a facility for reprocessing irradiated reactor fuels, or irradiated fuel from nuclear power reactors.

(k) "Transport" or "transportation" refers to the carriage and related handling of any material by a vessel, or by any other vehicle, including aircraft.

(l) "Convention" means the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter.

SUBCHAPTER I—REGULATION

§ 1411. Prohibited acts

(a) Except as may be authorized by a permit issued pursuant to section 1412 or section 1413 of this title, and subject to regulations issued pursuant to section 1418 of this title,

(1) no person shall transport from the United States, and

(2) in the case of a vessel or aircraft registered in the United States or flying the United States flag or in the case of a United States department, agency, or instrumentality, no person shall transport from any location

any material for the purpose of dumping it into ocean waters.

(b) Except as may be authorized by a permit issued pursuant to section 1412 of this title, and subject to regulations issued pursuant to section 1418 of this title, no person shall dump any material transported from a location outside the United States (1) into the territorial sea of the United States, or (2) into a zone contiguous to the territorial sea of the United States, extending to a line twelve nautical miles seaward from the base line from which the breadth of the territorial sea is measured, to the extent that it may affect the territorial sea or the territory of the United States.

§ 1412. Dumping permit program

Environmental Protection Agency permits

(a) Except in relation to dredged material, as provided for in section 1413 of this title, and in relation to radiological, chemical, and biological warfare agents and high-level radioactive waste, for which no permit may be issued, the Administrator may issue permits, after notice and opportunity for public hearings, for the transportation from the United States or, in the case of an agency or instrumentality of the United States, or in the case of a vessel or aircraft registered in the United States or flying the United States flag, for the transportation from a location outside the United States, of material for the purpose of dumping it into ocean waters, or for the dumping of material into the waters described in section 1411(b) of this title, where the Administrator determines that such dumping will not unreasonably degrade or endanger human health,

welfare, or amenities, or the marine environment, ecological systems, or economic potentialities. The Administrator shall establish and apply criteria for reviewing and evaluating such permit applications, and, in establishing or revising such criteria, shall consider, but not be limited in his consideration to, the following:

(A) The need for the proposed dumping.

(B) The effect of such dumping on human health and welfare, including economic, esthetic, and recreational values.

(C) The effect of such dumping on fisheries resources, plankton, fish, shellfish, wildlife, shore lines and beaches.

(D) The effect of such dumping on marine ecosystems, particularly with respect to—

(i) the transfer, concentration, and dispersion of such material and its byproducts through biological, physical, and chemical processes,

(ii) potential changes in marine ecosystem diversity, productivity, and stability, and

(iii) species and community population dynamics.

(E) The persistence and permanence of the effects of the dumping.

(F) The effect of dumping particular volumes and concentrations of such materials.

(G) Appropriate locations and methods of disposal or recycling, including land-based alternatives and the probable impact of requiring use of such alternate locations or methods upon considerations affecting the public interest.

(H) The effect on alternate uses of oceans, such as scientific study, fishing, and other living resource exploitation, and nonliving resource exploitation.

(I) In designating recommended sites, the Administrator shall utilize wherever feasible locations beyond the edge of the Continental Shelf.

In establishing or revising such criteria, the Administrator shall consult with Federal, State, and local officials, and interested members of the general public, as may appear appropriate to the Administrator. With respect to such criteria as may affect the civil works program of the Department of the Army, the Administrator shall also consult with the Secretary. In reviewing applications for permits, the Administrator shall make such provision for consultation with interested Federal and State agencies as he deems useful or necessary. No permit shall be issued for a dumping of material which will violate applicable water quality standards. To the extent that he may do so without relaxing the requirements of this subchapter, the Administrator, in establishing or revising such criteria, shall apply the standards and criteria binding upon the United States under the Convention, including its Annexes.

Permit categories

(b) The Administrator may establish and issue various categories of permits, including the general permits described in section 1414(c) of this title.

Sites and times for dumping

(c) The Administrator may, considering the criteria established pursuant to subsection (a) of this section, designate recommended sites or times for dumping and, when he finds it necessary to protect critical areas, shall, after consultation with the Secretary, also designate sites or times within which certain materials may not be dumped.

Fish wastes

(d) No permit is required under this subchapter for the transportation for dumping or the dumping of fish wastes, except when deposited in harbors or other protected or en-

closed coastal waters, or where the Administrator finds that such deposits could endanger health, the environment, or ecological systems in a specific location. Where the Administrator makes such a finding, such material may be deposited only as authorized by a permit issued by the Administrator under this section.

Foreign State permits; acceptance

(e) In the case of transportation of material, by a vessel or aircraft registered in the United States or flying the United States flag, from a location in a foreign State Party to the Convention, a permit issued pursuant to the authority of that foreign State Party, in accordance with Convention requirements, and which otherwise could have been issued pursuant to subsection (a) of this section, shall be accepted, for the purposes of this subchapter, as if it were issued by the Administrator under the authority of this section.

§ 1412a. Cessation of sewage sludge ocean dumping; "sewage sludge" defined

(a) The Administrator of the Environmental Protection Agency (hereinafter referred to in this section as the "Administrator") shall end the dumping of sewage sludge into ocean waters, or into waters described in section 1411(b) of this title, as soon as possible after November 4, 1977, but in no case may the Administrator issue any permit, or any renewal thereof (under Title I of the Marine Protection, Research, and Sanctuaries Act of 1972) which authorizes any such dumping after December 31, 1981.

(b) For purposes of this section, the term "sewage sludge" means any solid, semisolid, or liquid waste generated by a municipal waste-water treatment plant the ocean dumping of which may unreasonably degrade or endanger human health, welfare, amenities, or the marine environment, ecological systems, or economic potentialities.

The Outer Continental Shelf Lands Act, 43 U.S.C. (Supp. II) 1332, 1333, and 1349:

§ 1332. Congressional declaration of policy

It is hereby declared to be the policy of the United States that—

(1) the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter;

(2) this subchapter shall be construed in such a manner that the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected;

(3) the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs;

(4) since exploration, development, and production of the minerals of the outer Continental Shelf will have significant impacts on coastal and non-coastal areas of the coastal States, and on other affected States, and, in recognition of the national interest in the effective management of the marine, coastal, and human environments—

(A) such States and their affected local governments may require assistance in protecting their coastal zones and other affected areas from any temporary or permanent adverse effects of such impacts; and

(B) such States, and through such States, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national

interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf;

(5) the rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity should be considered and recognized; and

(6) operations in the outer Continental Shelf should be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the water or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health.

§ 1333. Laws and regulations governing lands—Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction

(a)(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(B) Within one year after September 18, 1978, the President shall establish procedures for settling any outstanding international boundary dispute respecting the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

§ 1349. Citizens suits, jurisdiction and judicial review—Persons who may bring action; persons against whom action may be brought; time of action; intervention by Attorney General; costs and fees; security

(a)(1) Except as provided in this section, any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this subchapter against any person, including the United States, and any other government instrumentality or agency (to the extent permitted by the eleventh amendment to

the Constitution) for any alleged violation of any provision of this subchapter or any regulation promulgated under this subchapter, or of the terms of any permit or lease issued by the Secretary under this subchapter.

(2) Except as provided in paragraph (3) of this subsection, no action may be commenced under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation, in writing under oath, to the Secretary and any other appropriate Federal official, to the State in which the violation allegedly occurred or is occurring, and to any alleged violator; or

(B) if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States or a State with respect to such matter, but in any such action in a court of the United States any person having a legal interest which is or may be adversely affected may intervene as a matter of right.

(3) An action may be brought under this subsection immediately after notification of the alleged violation in any case in which the alleged violation constitutes an imminent threat to the public health or safety or would immediately affect a legal interest of the plaintiff.

(4) In any action commenced pursuant to this section, the Attorney General, upon the request of the Secretary or any other appropriate Federal official, may intervene as a matter of right.

(5) A court, in issuing any final order in any action brought pursuant to subsection (a)(1) or subsection (c) of this section, may award costs of litigation, including reasonable attorney and expert witness fees, to any party, whenever such court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in a

sufficient amount to compensate for any loss or damage suffered, in accordance with the Federal Rules of Civil Procedure.

(6) Except as provided in subsection (c) of this section, all suits challenging actions or decisions allegedly in violation of, or seeking enforcement of, the provisions of this subchapter, or any regulation promulgated under this subchapter, or the terms of any permit or lease issued by the Secretary under this subchapter, shall be undertaken in accordance with the procedures described in this subsection. Nothing in this section shall restrict any right which any person or class of persons may have under any other Act or common law to seek appropriate relief.

Jurisdiction and venue of actions

(b)(1) Except as provided in subsection (c) of this section, the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this subchapter. Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose.

(2) Any resident of the United States who is injured in any manner through the failure of any operator to comply with any rule, regulation, order, or permit issued pursuant to this subchapter may bring an action for damages (including reasonable attorney and expert witness fees) only in the judicial district having jurisdiction under paragraph (1) of this subsection.

Review of Secretary's approval of leasing program; review of approval, modification or disapproval of exploration or production plan; persons who may seek review; scope of review; certiorari to Supreme Court

(c)(1) Any action of the Secretary to approve a leasing program pursuant to section 1344 of this title shall be subject to judicial review only in the United States Court of Appeal for the District of Columbia.

(2) Any action of the Secretary to approve, require modification of, or disapprove any exploration plan or any development and production plan under this subchapter shall be subject to judicial review only in a United States court of appeals for a circuit in which an affected State is located.

(3) The judicial review specified in paragraphs (1) and (2) of this subsection shall be available only to a person who (A) participated in the administrative proceedings related to the actions specified in such paragraphs, (B) is adversely affected or aggrieved by such action, (C) files a petition for review of the Secretary's action within sixty days after the date of such action, and (D) promptly transmits copies of the petition to the Secretary and to the Attorney General.

(4) Any action of the Secretary specified in paragraph (1) or (2) shall only be subject to review pursuant to the provisions of this subsection, and shall be specifically excluded from citizen suits which are permitted pursuant to subsection (a) of this section.

(5) The Secretary shall file in the appropriate court the record of any public hearings required by this subchapter and any additional information upon which the Secretary based his decision, as required by section 2112 of Title 28. Specific objections to the action of the Secretary shall be considered by the court only if the issues upon which such objections are based have been submitted to the Secretary during the administrative proceedings related to the actions involved.

(6) The court of appeals conducting a proceeding pursuant to this subsection shall consider the matter under review solely on the record made before the Secretary. The findings of the Secretary, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The court may affirm, vacate, or modify any order or decision or may demand the proceedings to the Secretary for such further action as it may direct.

(7) Upon the filing of the record with the court, pursuant to paragraph (5), the jurisdiction of the court shall be exclusive and its judgment shall be final, except that such judgment shall be subject to review by the Supreme Court of the United States upon writ of certiorari.

The Outer Continental Shelf Lands Act, 43 U.S.C. (1976) (superceded) 1332 and 1333:

§ 1332. Congressional declaration of policy; jurisdiction; construction

(a) It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter.

(b) This subchapter shall be construed in such manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected.

§ 1333. Laws and regulations governing lands—Constitution and United States laws; laws of adjacent States; publication of projected State lines; restriction on State taxation and jurisdiction

(a)(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and

seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or thereafter adopted, the civil and criminal laws of each adjacent State as of August 7, 1953, are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

The Submerged Lands Act of 1953, 43 U.S.C. Sections 1301(e), 1311(a), 1311(d).

43 U.S.C. 1301(e) (Definitions):

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish,

shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;

§ 1311. Rights of the States—Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

* * * * *

(d) Nothing in this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power;

Nos. 79-1711; 79-1754; 79-1760; 80-12 (Consolidated)

DEC 4 1980

MICHAEL RODAK JR., CLE

IN THE

Supreme Court of the United States

October Term, 1980

MIDDLESEX COUNTY SEWERAGE AUTHORITY, *et al.*,
Petitioners (79-1711),

vs.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

JOINT MEETING OF ESSEX AND UNION COUNTIES,
Petitioner (79-1754),

vs.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

CITY OF NEW YORK AND ABRAHAM BEAME,
Petitioners (79-1760),

vs.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Petitioners (80-12),

vs.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

On Writs of Certiorari to the United States Court of Appeals
for the Third Circuit

Petitions for Certiorari Filed April 29, 1980 (79-1711);
May 5, 1980 (79-1754); May 5, 1980 (79-1760); July 3, 1980 (80-12)
Certiorari Granted October 20, 1980

Brief for Petitioners Passaic Valley Sewerage Commissioners and the Linden Roselle Sewerage Authority

Charles C. Carella,
Carella, Bain, Gilfillan & Rhodes,
P.A.,
Counsel for Petitioners, Passaic Valley Sewerage Commissioners and the Linden Roselle Sewerage Authority.
Gateway I—Suite 2404,
Newark, New Jersey 07102
(201) 623-1700

John G. Gilfillan, III
Jeffrey L. Miller
Raymond G. Tomaszewski
Of Counsel

N.J. Appellate Printing Co., Inc., So. Plainfield, New Jersey (201) 753-0200

TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 1

Statutes Involved 1

Questions Presented for Review 2

Statement of the Case 2

SUMMARY OF ARGUMENT:

I. The Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act of 1972 do not imply a private right of action independent of the rights explicitly created by those citizens suit provisions of those acts 6

II. A private citizen has no standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution as a general federal question under 28 U.S.C. §1331 6

III. Any federal common law nuisance action for alleged damages sustained resulting from ocean pollution, if previously available to a private citizen, has been preempted by the present regulatory scheme governing ocean pollution established by the Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act 8

ARGUMENT:

I. The Federal Water Pollution Control Act, 33 U.S.C. & Supp. I) §§1251 et seq., and the Marine

TABLE OF CONTENTS

ARGUMENT:

Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. (& Supp. I) §§1401 et seq., do not imply a private right of action independent of the rights explicitly created by the citizens suit provisions of those Acts 10

II. A private citizen has no standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution as a general federal question under 28 U.S.C. §1331 10

III. Any federal common law nuisance action for alleged damages sustained resulting from ocean pollution, if previously available to a private citizen, has been preempted by the present regulatory scheme governing ocean pollution established by the Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act 17

Conclusion 21

CASES CITED:

Arizona v. California,
373 U.S. 546 (1963) 8, 19

Byram River v. Village of Port Chester,
394 F. Supp. 618 (S.D.N.Y. 1975) 11-12, 14

City of Evansville, Indiana v. Kentucky Liquid Recycling Corp.,
604 F.2d 1008 (7th Cir. 1979) 11

TABLE OF CONTENTS

CASES CITED:

Committee for Consideration of Jones Falls Sewerage System v. Train,
375 F. Supp. 1143 (D. Md. 1974),
aff'd on different but not inconsistent grounds,
539 F.2d 1006 (4th Cir. 1976) 11, 12

Cort v. Ash,
422 U.S. 66 (1975) 5

E.P.A. v. State Water Resources Control Board,
462 U.S. 200 (1976) 17

Georgia v. Tennessee Copper Co.,
206 U.S. 230 (1907) 13

Highland Park v. Train,
519 F.2d 681 (7th Cir. 1975),
cert. den. 424 U.S. 927 (1976) 11

Illinois v. City of Milwaukee,
406 U.S. 91 (1972) 6, 10, 11, 12

Illinois v. City of Milwaukee,
599 F.2d 151 (8th Cir. 1979), cert. granted,
— U.S. —, 48 U.S.L.W. 3902 (March 18, 1980) .. 20

Parsell v. Shell Oil Co.,
421 F. Supp. 1275 (D. Conn. 1976), aff'd mem.
sub nom. East End Yacht Club, Inc. v. Shell Oil
Co., 573 F.2d 1289 (2d Cir. 1977) 11

Texas v. Pankey,
441 F.2d 236 (10th Cir. 1971) 10

Township of Long Beach v. City of New York,
445 F. Supp. 1203 (D.N.J. 1978) 11

TABLE OF CONTENTS

CASES CITED:

United States Steel Corp. v. Train,
556 F.2d 822 (7th Cir. 1977) 18

United States v. Ira S. Bushey & Sons, Inc.,
346 F. Supp. 145 (D. Vt. 1972), 363 F. Supp. 110
D. Vt. 1973), aff'd 487 F.2d 1393 (2d Cir. 1973),
cert. den. 417 U.S. 976 (1976) 11

United States v. Stoeco Homes, Inc.,
489 F.2d 597 (3d Cir. 1974),
cert. den. 420 U.S. 927 (1975) 11

United States v. United States Steel Corp.,
356 F. Supp. 556 (N.D. Ill. 1973) 11

Willamette Iron Bridge Co. v. Hatch,
125 U.S. 1 (1888) 14

UNITED STATES CODES CITED:

Federal Water Pollution Control Act,

33 U.S.C. §1251, et seq. 1, 2, 3, 10, 15, 17

33 U.S.C. §1251(a)(1) 18

33 U.S.C. §1251(b) 18

33 U.S.C. §1365(a) 4

33 U.S.C. §1365(e) 5, 15

33 U.S.C. §1311(a) 17

33 U.S.C. §1370 18

TABLE OF CONTENTS

Marine Protection Research and Sanctuaries Act of 1972,

33 U.S.C. §1401 et seq. 1, 2, 3, 10, 18, 19

33 U.S.C. §1415(g)(5) 4, 5, 15

JUDICIAL CODES CITED:

28 U.S.C. §1331(a) 1, 10

28 U.S.C. §1331 ..... 1, 2, 4, 5, 6, 10, 14, 16

28 U.S.C. §1254(1) 1

28 U.S.C. §1291 1

FEDERAL RULES OF CIVIL PROCEDURE CITED:

12(b) 4

MISCELLANEOUS CITED:

Friendly, "In Praise of Erie—and the New Federal Common Law. 39 N.Y.U. L. Rev. 383 (1964) ... 14

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, filed February 5, 1980, is reported at 616 F.2d 1222 (App. A, p. 1a *et seq.*).* The opinion of the United States District Court for the District of New Jersey, filed August 14, 1978, is unreported (App. C, p. 5a *et seq.*).

JURISDICTION

Jurisdiction of this Court is pursuant to 28 U.S.C. §1254(1). Jurisdiction of the Court of Appeals was pursuant to 28 U.S.C. §1291.

The grounds of jurisdiction of the District Court invoked by plaintiffs, to the extent that they were sustained by the Court of Appeals in reversing the dismissal of the action by the District Court, are based upon the Federal Water Pollution Control Act, as amended, 33 U.S.C. §1251, *et seq.* (FWPCA), the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. §1401 *et seq.*) (MPRSA), 28 U.S.C. §1331(a) and 28 U.S.C. §1331.

STATUTES INVOLVED

The statutory provisions involved are the Federal Water Pollution Control Act, as amended, 33 U.S.C. §1251, *et seq.* (FWPCA), and the Marine Protection, Research and Sanctuaries Act of 1972, as amended (MPRSA), (33 U.S.C. §1401 *et seq.*).

---

* References to appendix, except where otherwise indicated, are to the Appendix to the Petition for Certiorari of Petitioner Environmental Protection Agency.

The test of the statutory provisions involved is set forth in pages 1 through 6 of the Petition for Certiorari of Petitioner Environmental Protection Agency.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Federal Water Pollution Control Act, 33 U.S.C. (& Supp. I) §§1251 *et seq.*, and the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. (& Supp. I) §§1401 *et seq.*, imply a private right of action independent of the rights explicitly created by the citizens suit provisions of those Acts.

2. Whether a private citizen has standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution as a general federal question under 28 U.S.C. §1331.

3. Whether any federal common law nuisance action for alleged damages sustained resulting from ocean pollution, if available to a private citizen, is not preempted by the present regulatory scheme governing ocean pollution established by the Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act.

STATEMENT OF THE CASE

Respondent National Sea Clammers Association is an association whose members earn their living harvesting fish and shellfish in the Atlantic Ocean off the coast of New York and New Jersey. Respondent Gosta Lovgren is an individual member of the association. On January 14, 1977, these two respondents brought suit, on behalf of themselves and purportedly on behalf of all others similarly

situated, against all petitioners, in the United States District Court for the District of New Jersey.

The Complaint alleges that the petitioning sewerage authorities, as well as the City of New York, other municipalities in the area, and various federal agencies and officers, discharge effluent and dump dredge spoil, sludge, and other toxic materials into the Atlantic Ocean and its tributaries. Some of these discharges and dumping activities are alleged to be authorized by permits issued by petitioner Army Corps of Engineers to the petitioning sewerage authorities in the course of the administration of various federal pollution control statutes. The Complaint further alleges that the dumped and discharged materials caused a massive growth of algae in 1976 in an area extending up to twenty miles offshore from Long Island, New York to Cape May, New Jersey. When this algae mass bloomed and died it allegedly settled and decomposed on the ocean floor, the decomposition allegedly creating an oxygen deficiency that caused severe damage to marine life in the area. The Complaint states further that the dumped and discharged materials "have caused and continue to cause massive destruction of marine plant life, fish, clams, lobsters and other marine life unable to escape and thereby, has caused and continues to cause the collapse of the fishing, clamming and lobster industries which operate in the waters of the Atlantic Ocean." Complaint ¶39. Joint Appendix p. 26a.

The Complaint alleges violations of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1251 *et seq.*, the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA), 33 U.S.C. §1401 *et seq.*, the federal common law of nuisance, and other statutes and constitutional provisions not relevant to the present review. The relief sought includes the imposition of fines and penalties against

the dumpers and dischargers to be paid in part to the respondents, a declaration that petitioners have failed to comply with the requirements of the FWPCA and MPRSA, mandamus to compel the federal petitioners to revoke all permits allowing the allegedly harmful activities, and an injunction prohibiting further dumping of "sewage, sludge or other pollutants off the coast of the Continental United States. . . ." In addition, the Complaint seeks a quarter billion dollars in actual damages and a quarter billion dollars in punitive damages to be "assessed against defendants jointly and severally." Complaint ¶¶94-109. Joint Appendix p. 41a-45a.

Petitioners and most of the other defendants moved to dismiss the claims under *Fed. R. Civ. P.* 12(b). The district court treated the motion as a motion for summary judgment and ordered the complaint dismissed with prejudice, with the exception of certain pendant State law claims which were dismissed without prejudice (App. D, p. 60a-61a).

The court dismissed the claims under the FWPCA and the MPRSA because the respondents did not comply with the sixty (60) day prelitigation notice requirements of the citizen suit provisions of those Acts, 33 U.S.C. §1365(a) and 33 U.S.C. §1415(g)(5). Also rejected was the argument that implied rights of action jurisdictionally based on 28 U.S.C. §1331 and not subject to the specific requirements of the citizen suit provisions exist under the FWPCA and MPRSA (App. C, p. 43a-50a).

Claims based upon the federal common law of nuisance were dismissed, the court holding that private parties have no standing to bring such claims (App. C, p. 40a-41a). All other claims were dismissed. None, however, is a subject of the present review.

The Court of Appeals reversed in part, reinstating the claims under the FWPCA, the MPRSA and the federal

common law of nuisance, ruling that private parties can maintain an action under the federal common law of nuisance (App. A, p. 20a-24a).

With respect to the claim under the FWPCA, the court of appeals agreed that the respondents had not met the requirements of the citizen suit provision of that statute. However, the court held that respondents had an alternate basis for suit under 33 U.S.C. §1365(e), invoking jurisdiction under 28 U.S.C. §1331. Section 505(e) is a "savings clause", reciting that the citizen suit provision does not "restrict any right . . . under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief." Applying the analysis of *Cort v. Ash*, 422 U.S. 66 (1975), the court of appeals found that a private right of action should be implied under the FWPCA on behalf of individuals injured by pollution in violation of those statutes (App. A, p. 11a-16a). This implied right of action, the court concluded, was "preserved" by the savings clause and therefore the plaintiffs could maintain their claims alleging violations of the FWPCA without reference to the restrictions imposed by the citizen suit provision.

The court of appeals then examined the similar citizen suit provision of the MPRSA and ruled that it was indistinguishable from that of the FWPCA for these purposes. Accordingly, it held that the savings clause of the MPRSA, 33 U.S.C. §1415(g)(5), also preserved an implied private right of action under that statute separate from the citizen suits authorized by 33 U.S.C. §1415(g) (App. A, p. 16a-18a).

Petitions were made to this court for a Writ of Certiorari, and on October 20, 1980 the petitions were granted, limited to the questions set forth in the questions presented for review, *supra*. Joint Appendix p. 48a.

SUMMARY OF ARGUMENT

I. The Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act of 1972 do not imply a private right of action independent of the rights explicitly created by those citizens suit provisions of those acts.

Petitioners Passaic Valley Sewerage Commissioners and the Linden Roselle Sewerage Authority adopt as argument for the above-stated proposition those arguments set forth by Petitioner Environmental Protection Agency *et al.*

II. A private citizen has no standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution as a general federal question under 28 U.S.C. §1331.

In *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), this Court extended to States the right to maintain an action for pollution of interstate waters under the federal common law of nuisance. Subsequent lower court decisions have extended such right of action to the United States. The majority of lower court decisions rendered subsequent to *Illinois v. City of Milwaukee* that have addressed the issue of whether or not a private party may maintain such an action have resolved the question in the negative.

The rationale of recognizing a right of action by States in *Illinois v. City of Milwaukee* is based upon the protection of the States' sovereign interests in pollution free waters as against persons or political entities outside of the State. Bereft of such a rationale in the instant case, the court below justified its extension of the federal common

law nuisance action to private parties on the "need for a uniform rule of decision" rationale mentioned in footnote 6 of *Illinois v. City of Milwaukee,* speculating that the Plaintiffs would otherwise be subject to possibly conflicting New York and New Jersey nuisance standards. The court below failed, however, to hold whether or not there were in fact any such conflicting standards, or comment upon the manner, if any, in which such hypothetically conflicting standards could work to the prejudice of the Plaintiffs.

There is a clear rationale for not extending standing to a private party to bring a cause of action under the federal common law of nuisance. At that point in history where Congress had not as yet acted with respect to nuisances or obstructions of navigable waters, this Court denied a right of action under federal common law. Congress has now acted, but has expressly set forth in its legislative purposes the policy to recognize, preserve and protect the primary responsibilities and rights of the States to prevent, reduce and eliminate pollution.

Yet another reason for not extending the right of action under federal common law to private parties is that to do so would place parties such as the present petitioners in impossible operating circumstances, forcing them to carry out their statutory duties to their citizens, comply with a multitude of federal and state regulations, and then to attempt to comply with unwritten and potentially unpredictable federal common law standards.

III. Any federal common law nuisance action for alleged damages sustained resulting from ocean pollution, if previously available to a private citizen, has been preempted by the present regulatory scheme governing ocean pollution established by the Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act.

Subsequent to the decision of *Illinois v. City of Milwaukee,* the Federal Water Pollution Control Act has been amended with an attendant increase in scope and effect of the administrative regulations adopted by petitioner Environmental Protection Agency. Every point source capable of discharging pollutants into a navigable body of water must now be approved by the Environmental Protection Agency, which has the power and duty to impose stringent limitations on the content of their discharges and the manner in which they must be treated. Discharge of a pollutant without such approval is unlawful. The amendments also create a timetable for the complete elimination of water pollution.

Also, subsequent to the decision in *Illinois v. City of Milwaukee,* Congress has enacted the Marine Protection, Research and Sanctuaries Act, which prohibits the dumping of any material into ocean waters except as authorized by permit. Where a State desires to extend dumping regulations or criteria beyond those set forth in the Act, it must do so through the Federal Government.

Where Congress has acted not only to express a federal interest but to establish a formula for definition and enforcement of such interests, this Court has held federal common law to be preempted and replaced. See *e.g., Arizona v. California,* 373 U.S. 546 (1963). With respect to the Acts in question, Congress has now taken over the

problems of point discharging of treated effluent and the ocean dumping of sludge as well as the evaluation and protection of interests affected thereby. The statutes set forth mechanisms for defining standards to be followed and enforcement provisions for failure to follow such standards. Appropriations have been made to government agencies to carry out fully the mandates of the legislation. Clearly, in the light of such activity, the legislation has preempted any pre-existing federal common law.

ARGUMENT

I. The Federal Water Pollution Control Act, 33 U.S.C. (& Supp. I) §§1251 *et seq.*, and the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. (& Supp. I) §§1401 *et seq.*, do not imply a private right of action independent of the rights explicitly created by the citizens suit provisions of those Acts.

Petitioners Passaic Valley Sewerage Commissioners and the Linden Roselle Sewerage Authority adopt as argument for the above stated proposition those arguments set forth by Petitioner Environmental Protection Agency *et al.*

II. A private citizen has no standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution as a general federal question under 28 U.S.C. §1331.

In *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), this Court held that pollution of interstate or navigable waters creates an action arising under the laws of the United States within the meaning of 28 U.S.C. §1331(a) that may be asserted by a State. Citing *Texas v. Pankey*, 441 F.2d 236, 240 (10th Cir. 1971), the Court limited the issue to only whether a State could maintian such an action, for as was stated:

> As the field of federal common law has been given necessary expansion into matters of federal concern and relationship (where no applicable federal statute exists, as there does not here), the ecological rights of a State in the improper impairment of them from sources outside the State's own territory, now would and should, we think, be held to be a matter having

basis and standard in federal common law and so directly constituting a question arising under the laws of the United States. 406 U.S. at 99-100.

Several lower court cases decided subsequent to *Illinois v. City of Milwaukee, supra,* recognized the availability of the federal common law remedy of nuisance to the United States. See, *e.g., United States v. Ira S. Bushey & Sons, Inc.,* 346 F. Supp. 145 (D. Vt. 1972), 363 F. Supp. 110 (D. Vt. 1973), *aff'd* 487 F.2d 1393 (2d Cir. 1973), *cert. den.* 417 U.S. 976 (1976); *United States v. United States Steel Corp.,* 356 F. Supp. 556 (N.D. Ill. 1973); *United States v. Stoeco Homes, Inc.,* 489 F.2d 597 (3d Cir. 1974), *cert. den.* 420 U.S. 927 (1975).

Presented for review by this Court is now the question as to whether or not such a cause of action based on the federal common law is available to private parties.

The majority of the lower court decisions rendered subsequent to *Illinois v. City of Milwaukee, supra,* that have addressed the issue have held that federal common law nuisance actions cannot be maintained by private plaintiffs. See *Parsell v. Shell Oil Co.,* 421 F. Supp. 1275, 1281 (D. Conn. 1976), *aff'd mem. sub nom. East End Yacht Club, Inc. v. Shell Oil Co.,* 573 F.2d 1289 (2d Cir. 1977); *Committee for Consideration of Jones Falls Sewerage System v. Train,* 375 F. Supp. 1148, 1153-1154 (D. Md. 1974), *aff'd on different but not inconsistent grounds,* 539 F.2d 1006 (4th Cir. 1976); *cf. City of Evansville, Indiana v. Kentucky Liquid Recycling Corp.,* 604 F.2d 1008 (7th Cir. 1979); *Township of Long Beach v. City of New York,* 445 F. Supp. 1203 (D.N.J. 1978); *Highland Park v. Train,* 519 F.2d 681 (7th Cir. 1975), *cert. den.* 424 U.S. 927 (1976). The only cases known to petitioner wherein standing to sue has been extended to private individuals are *Byram River v. Village of Port Chester,* 394 F. Supp.

618 (S.D.N.Y. 1975), and the Third Circuit decision in the case at bar.

The controversy at the lower court level has arisen in part from the text of footnote 6 of *Illinois v. City of Milwaukee,* 406 U.S. at 105, to wit:

> Thus, it is not only the character of the parties that requires us to apply federal law. . . . [W]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law. . . .

The Third Circuit in the case at bar cited the text of the aforesaid footnote as support for extending the federal common law nuisance action to private parties. App. A, p. 21a-24a. A contrary reading of the footnote was undertaken by the District Court opinion in *Committee for Consideration of Jones Falls Sewerage System v. Train, supra:*

> * * * 'it is not only the character of the parties that requires us to apply federal law.' This statement can be read in at least two different ways. It could mean (a) that there were other considerations sufficient in themselves to require application of federal law, or (b) that there were other federal interests which in addition to the character of the parties required the application of the federal law although those interests in themselves would not have been sufficient. In the view this Court takes of the basis for the Supreme Court's decision, the latter interpretation is the proper one. 375 F. Supp. at 1154, 1155 n.12.

The rationale of recognizing a right of action by States as announced in *Illinois v. City of Milwaukee* appears to

be that of protecting the State's sovereign interests in pollution free waters as against persons or political subdivisions outside of the State. Virtually all of the pollution cases relied upon in *Illinois v. City of Milwaukee* involved claims by a sovereign that its sovereign interests were being infringed by activities of persons in another State. For example, this Court quoted extensively from *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907), where the rationale for development of a federal common law of nuisance entailed provision of a forum to peacefully adjudicate disputes between States as a necessary corollary to the federal system:

> * * * When the states by their union made the forceable abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests; and the alternative to force is a suit in this court. 206 U.S. at 237.

Likewise, in framing its ruling, the Court in *Illinois v. City of Milwaukee* defined the interests to be protected by the federal common law cause of action as "the ecological rights of a State in the improper impairment of them from sources outside the State's own territory . . . ." 406 U.S. at 100.

Bereft of such a rationale in the instant case, the Third Circuit has justified its extension of the federal common law nuisance action to private parties on the "need for a uniform rule of decision" rationale in footnote 6 of *Illinois v. City of Milwaukee*. Specifically, the Third Circuit held that "relegating these litigants to possibly conflicting New York and New Jersey nuisance standards would ignore the clear

intent of the Supreme Court to federalize those standards and would undermine that federal uniformity." App. A, p. 21a-22a. The problem is that the Third Circuit does not identify the "possibly conflicting New York and New Jersey nuisance standards," nor does the decision provide support for an inference that any such standards conflict. Moreover, even if any such standards were in conflict, the Third Circuit has not opined that such a conflict would necessarily work a prejudice to the respondent plaintiffs.

The only other water pollution case wherein a Court allowed a cause of action alleging violation of the federal common law to be maintained by a private party is *Byram River v. Village of Port Chester, supra.* In that case, the Court did not discuss the issue as to whether or not a private party had standing to bring a federal common law nuisance action, and it would appear that no party raised the issue in the course of proceedings dealing with motions to dismiss. The Court there cited *Illinios v. City of Milwaukee* for the proposition that subject matter jurisdiction existed under 28 U.S.C. §1331 to consider a claim of nuisance upon interstate waters in violation of federal common law, and said nothing further. Thus, that case also provides no indication of a rationale for extending the right of action to a private party.

It is respectfully submitted that there is a clear rationale for not extending standing to a private party to bring a cause of action under the federal common law of nuisance. Federal common law is applied where the Congress or the constitution manifests a federal interest. See Friendly, "In Praise of Erie—and the New Federal Common Law." 39 N.Y.U. L. Rev. 383 (1964). At that point in history where Congress had not acted with respect to nuisances or obstructions of navigable waters, this Court denied a right of action under federal common law. *Willamette Iron Bridge Co. v. Hatch,* 125 U.S. 1 (1888).

Congress has now acted, but in a fashion which suggests that whatever has not been legislated to be the responsibility of the federal government is reserved to the States. Thus, in §1251(b) of the FWPCA, Congress stated:

> It is the policy of the Congress to recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution . . . .

Certainly, the savings clauses of FWPCA, 33 U.S.C. §1365(e) and MPRSA, 33 U.S.C. §1415(g)(5), preserve any right which any person may have "under any statute or common law to seek enforcement of any effluent standard or to seek any other relief . . . ." Nothing in the aforesaid saving language requires the conclusion that the stated common law is other than the common law of the States.

To recognize a right of action of federal common law nuisance to be the States' as was done in *Illinois v. City of Milwaukee, supra* is not inconsistent with the stated legislative policy. To extend such a right to individuals, however, would be beyond the stated policy and in derogation of States' rights to identify and weigh the benefits and adverse effects of allegedly polluting activities not otherwise within the purview of the federal scheme, in the light of the interests of the States and their citizens.

Yet another reason for not extending the right of action under federal common law to private parties is that to do so would place parties such as the undersigned petitioners in impossible operating circumstances. Petitioner Passaic Valley Sewerage Commissioners, for example, must treat and remove sewage generated by 1,300,000 people, 350 industries, 2,200 commercial enterprises, and 29 municipalities, and at the same time comply with extremely

stringent and prolific federal and state regulations. It would be oppressive to engraft upon these tasks the additional burdens of meeting unwritten standards of the federal common law of nuisance as they may arise and be enforced at the behest of private parties. The *Illinois v. City of Milwaukee* recognition of the availability of the federal common law nuisance action to States does not create a problem for Petitioners, since they always will be required to deal with the express standards of these States. To the extent that Petitioners discharge into a body of water commonly bordering on New York and New Jersey, compliance with the federal standards set forth in the various applicable legislative acts and regulations provides an anticipatory solution to the possibility of conflicting State standards. However, to be required to attempt to plan based upon unannounced standards would adversely affect activities such as facilities planning, financing and operations.

Finally, as will be noted in greater detail in Argument III *infra,* there is simply no need to extend the federal common law of nuisance action to private parties given the existing statutory standards and enforcement mechanisms.

For these reasons, Petitioners urge this Court to rule that a private citizen does not have standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution as a general federal question under 28 U.S.C. §1331.

III. Any federal common law nuisance action for alleged damages sustained resulting from ocean pollution, if previously available to a private citizen, has been preempted by the present regulatory scheme governing ocean pollution established by the Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act.

In *Illinois v. City of Milwaukee*, this Court forecast this issue:

> It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution. 406 U.S. at 107.

Subsequent to the decision of *Illinois v. City of Milwaukee*, the Federal Water Pollution Control Act was amended, see Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, 33 U.S.C. §1251 *et seq.*, with an attendant increase in scope and effect of the administrative regulations adopted by Petitioner Environmental Protection Agency. Every point source capable of discharging pollutants into a navigable body of water now must be approved by the Environmental Protection Agency, which has the power and duty to impose stringent limitations on the content of their discharges and the manner in which they must be treated. *E.P.A. v. State Water Resources Control Board*, 462 U.S. 200 (1976). Discharge of a pollutant without such approval is unlawful. 33 U.S.C. §1311(a). The amendments also create a timetable for the complete elimination of water pollution, *i.e.*, that "it is the national goal that the discharge of pollutants

into the navigable waters be eliminated by 1985." 33 U.S.C. §1251(a)(1).

To the extent that effluent limitations imposed under the FWPCA are less than what may be desired by individual states, the Act provides that such states may establish more stringent limitations. 33 U.S.C. §1370; *United States Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977). This, of course, is consistent with the statutorily stated policy of Congress to preserve in the states primary responsibility for preventing, reducing and eliminating pollution from point discharges, 33 U.S.C. §1251(b).

It is submitted, therefore, that under FWPCA, Congress has legislated into federal control those discharges which are appropriate for uniform federal regulation. Limitations outside the federal regulation are not left to be filled by the development of a federal common law but rather are preserved to the states. In such a case, there is no reason for the existence of a federal common law and all considerations otherwise the subject of the federal common law should be deemed to have been preempted.

Also subsequent to the decision in *Illinois*, Congress enacted MPRSA, 33 U.S.C. §§1401-1444, also known as the Ocean Dumping Act. MPRSA prohibits the dumping of *any* material into ocean waters except as authorized by permit. 33 U.S.C. §1411.

Implementation of MPRSA requires a determination as to all materials other than dredged materials, that their dumping will not unreasonably degrade or endanger human health, welfare or amenities or the marine environment, ecological systems, or economic potentialities. 33 U.S.C. §1412. The dumping of dredged materials is regulated by the Secretary of the Army pursuant to 33 U.S.C. §1413.

Thus, *every* act of dumping of material of *any type* is subject to federal review in the context of weighing societal benefit and detriment. In this context, it is respectfully submitted that there are no statutory interstices which might otherwise form the basis for development of a body of federal common law and as such any federal common law regarding ocean dumping has been preempted. Further, where a state desires to extend dumping regulations or criteria, it must do so through the federal government. 33 U.S.C. §1416(d).

Where Congress has acted not only to express a federal interest but to establish a formula for definition and enforcement of such interests, this Court has held federal common law to be preempted and replaced. See, *e.g.*, *Arizona v. California*, 373 U.S. 546 (1963) wherein, with respect to allocation of water from the Colorado River between the States of California and Arizona, this Court stated:

> It is true that the Court has used the doctrine of equitable apportionment to decide river controversies between States. But in those cases Congress has not made any statutory apportionment. In this case, we have decided that Congress has provided its own method for allocating among the Lower Basin States the mainstream water to which they are entitled under the Compact. Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own nations of an 'equitable apportionment' for the apportionment chosen by Congress. . . . 373 U.S. at 565.

With respect to both FWPCA and the MPRSA, Congress has taken control over the problems of point discharging of treated effluent and the ocean dumping of

sludge as well as the evaluation and protection of interests affected thereby. The statutes set forth mechanisms for defining standards to be followed and enforcement provisions for failure to follow such standards. Appropriations have been made to government agencies to carry out fully the mandates of the legislation. Clearly, in the light of such activity, the legislation has preempted any pre-existing federal common law.

Petitioners are aware that this Court has granted *certiorari* to review the recent Circuit Court decision in *Illinois v. City of Milwaukee*, 599 F.2d 151 (8th Cir. 1979), *cert. granted*, — U.S. —, 48 U.S.L.W. 3902 (March 18, 1980), to consider the question of whether the present FWPCA, as now amended, preempts the federal common law of nuisance as it applies to point source discharges. In this regard Petitioners join in the argument of Petitioners in the *Illinois* case, it being submitted that the rationale of preemption by FWPCA is no different as to ocean discharges than it is as to discharges into interstate bodies of water.

CONCLUSION

For the above-stated reasons, Petitioners respectfully urge this Court to reverse and vacate the judgment of the United States Court of Appeals for the Third Circuit, and to instruct that the case be remanded to the United States District Court for the District of New Jersey for dismissal of respondent's claims under the Federal Water Pollution Control Act, the Marine Protection, Research and Sanctuaries Act, and Federal Common Law of Nuisance.

Respectfully submitted,

/s/ Charles C. Carella
CHARLES C. CARELLA

CARELLA, BAIN,
GILFILLAN & RHODES, P.A.,
Attorneys for Petitioners,
Passaic Valley Sewerage
Commissioners and the Linden
Roselle Sewerage Authority,

Gateway I—Suite 2404,
Newark, New Jersey 07102
(201) 623-1700

Of Counsel:
JOHN G. GILFILLAN, III
JEFFREY L. MILLER
RAYMOND G. TOMASZEWSKI

Nos. 79-1711, 79-1754, 79-1760 and 80-12

FILED
DEC 12 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

MIDDLESEX COUNTY SEWERAGE AUTHORITY, ET AL., PETITIONERS

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.

JOINT MEETING OF ESSEX AND UNION COUNTIES, PETITIONER

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.

CITY OF NEW YORK AND ABRAHAM BEAME, PETITIONERS

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.

ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

ALAN I. HOROWITZ
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
RAYMOND N. ZAGONE
JACQUES B. GELIN
DAVID T. BUENTE, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1711

MIDDLESEX COUNTY SEWERAGE AUTHORITY, ET AL., PETITIONERS

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.

No. 79-1754

JOINT MEETING OF ESSEX AND UNION COUNTIES, PETITIONER

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.

No. 79-1760

CITY OF NEW YORK AND ABRAHAM BEAME, PETITIONERS

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.

No. 80-12

ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

QUESTIONS PRESENTED

1. Whether the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. (& Supp. I) 1251 *et seq.*, and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. (& Supp. I) 1401 *et seq.*, imply a private right of action independent of the rights explicitly created by the citizen suit provisions of those Acts, 33 U.S.C. 1365 and 33 U.S.C. 1415(g).

---

* Other petitioners in No. 80-12 are Russell E. Train, individually and as Administrator of the United States Environmental Protection Agency, United States Army Corps of Engineers, and Martin R. Hoffman, individually and as Secretary of the United States Department of the Army. Douglas M. Costle is now the Administrator of EPA and Clifford L. Alexander is now the Secretary of the Army.

Other petitioners in No. 79-1711 are Bergen County Sewer Authority, Passaic Valley Sewerage Commissioners, the Linden Roselle Sewerage Authority and Middletown Sewerage Authority.

Gosta Lovgren is a respondent in all petitions.

2. Whether a private citizen has standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution as a general federal question under 28 U.S.C. 1331.

3. Whether any federal common law nuisance action for alleged damages sustained resulting from ocean pollution, if available to a private citizen, is not preempted by the present regulatory scheme governing ocean pollution established by the Federal Water Pollution Control Act (Clean Water Act) and the Marine Protection, Research, and Sanctuaries Act of 1972.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	1
Statement	1
Summary of argument	7
Argument:	
I. No private right of action can be implied under the Clean Water Act or the MPRSA apart from the citizen suits explicitly provided for in those statutes	10
A. The Clean Water Act and the MPRSA draw no distinction between plaintiffs based on the type of injury alleged	14
B. Congress had no intent to create a private remedy under these statutes other than that specified in the citizen suit provisions..	17
C. Application of the *Cort* factors also suggests that no private right of action should be implied	22
II. A private party has standing to bring an action for damages under the federal common law of nuisance	27
III. The Clean Water Act and the MPRSA do not preempt the federal common law of nuisance....	36
Conclusion	38
Appendix	1a

PREVIOUS PAGE WAS BLANK

TABLE OF AUTHORITIES

Cases: Page

Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 29
Bank of America v. *Parnell*, 352 U.S. 29 ..... 31, 34
Byram River v. *Village of Port Chester*, 394 F. Supp. 618 34
Cannon v. *University of Chicago*, 441 U.S. 677..... 13, 23
City of Evansville v. *Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, cert. denied, 444 U.S. 1025.. 26, 34
City of Highland Park v. *Train*, 519 F.2d 681 26
Clearfield Trust Co. v. *United States*, 318 U.S. 363.. 29
Committee for Consideration of Jones Falls Sewage System v. *Train*, 375 F. Supp. 1148, aff'd on different but not inconsistent grounds, 539 F.2d 1006 34
Commonwealth of Massachusetts v. *United States Veterans Administration*, 541 F.2d 119 28
Cort v. *Ash*, 422 U.S. 66 .....5, 7, 13, 14, 22, 23, 26
Crown Simpson Pulp Co. v. *Costle*, 445 U.S. 193.... 11
Debs, In re, 158 U.S. 564 32
E. I. du Pont de Nemours & Co. v. *Train*, 430 U.S. 112 ..... 11, 17
Georgia v. *Tennessee Copper Co.*, 206 U.S. 230..... 30
Hinderlider v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 .....9, 29, 33
Illinois v. *City of Milwaukee*, 406 U.S. 91 .....6, 9, 28, 29, 30, 31, 34
Illinois v. *Outboard Marine Corp.*, 619 F.2d 623, petition for cert. pending, No. 80-126 (filed July 28, 1980) 32
Kaiser Aetna v. *United States*, 444 U.S. 164 32
Kansas v. *Colorado*, 206 U.S. 46 29
National Railroad Passenger Corp. v. *National Association of Railroad Passengers*, 414 U.S. 453.. 14-15
Natural Resources Defense Council v. *Callaway*, 524 F.2d 79 26
Natural Resources Defense Council v. *Train*, 510 F.2d 692 26
New Jersey v. *City of New York*, 283 U.S. 473..... 30
New York v. *New Jersey*, 256 U.S. 296 30

Cases—Continued

Page

Parsell v. *Shell Oil Co.*, 421 F. Supp. 1275, aff'd, 573 F.2d 1289 (Table) 34
Reserve Mining Co. v. *EPA*, 514 F.2d 492 33
Sanitary District v. *United States*, 266 U.S. 405.... 32
Sierra Club v. *Morton*, 405 U.S. 727 ..... 15, 16
Touche Ross & Co. v. *Redington*, 442 U.S. 560..... 7, 13, 14, 22
Township of Long Beach v. *City of New York*, 445 F. Supp. 1203 34
Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U.S. 11 .....7, 13, 14, 15, 22
Union Oil Co. v. *Oppen*, 501 F.2d 558 36
United States v. *Appalachian Electric Power Co.*, 311 U.S. 377 32
United States v. *Atlantic-Richfield Co.*, 478 F. Supp. 1215 32
United States v. *California*, 332 U.S. 19 30
United States v. *Ira S. Bushey & Sons*, 346 F. Supp. 145, 363 F. Supp. 110, aff'd, 487 F.2d 1393 (Table), cert. denied, 417 U.S. 976 32-33
United States v. *Mitchell*, 445 U.S. 535 28
United States v. *Stoeco Homes, Inc.*, 498 F.2d 597, cert. denied, 420 U.S. 927 32
United States v. *Testan*, 424 U.S. 392 28
United States ex rel. Scott v. *United States Steel Corp.*, 356 F. Supp. 556 33
Vermont v. *New York*, 417 U.S. 270 29-30
Willamette Iron Bridge Co. v. *Hatch*, 125 U.S. 1.... 31

Constitution, treaty, statutes and rule:

United States Constitution:

Fifth Amendment 3, 5
Ninth Amendment 3
Fourteenth Amendment 3

Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, T.I.A.S. No. 5639 (1964) 30
Act of Dec. 28, 1973, Pub. L. No. 93-207, 87 Stat. 906 2

Constitution, treaty, statutes and rule—Continued	Page
Act of Nov. 2, 1978, Pub. L. No. 95-576, 92 Stat. 2467	2
Administrative Procedure Act, 5 U.S.C. 701 *et seq.*	3
Section 10, 5 U.S.C. 702	15
Clean Air Act, 42 U.S.C. (Supp. I) 7604	8, 11
Clean Water Act (Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566), 33 U.S.C. 1251 *et seq.*	2, 3
33 U.S.C. 1251(a)	22
33 U.S.C. 1251(a)(1)	33
33 U.S.C. 1251(a)(2)	33
33 U.S.C. (& Supp. I) 1311(b)	11
33 U.S.C. (& Supp. I) 1314(a)	23
33 U.S.C. (& Supp. I) 1319	11
33 U.S.C. (Supp. I) 1321(b)	31
33 U.S.C. (& Supp. I) 1342	11
33 U.S.C. (Supp. I) 1364(a)	23
33 U.S.C. 1365	1, 4, 5, 11, 17, 1a
33 U.S.C. 1365(a)(1)	12
33 U.S.C. 1365(a)(2)	12
33 U.S.C. 1365(b)	12, 24
33 U.S.C. 1365(b)(1)(B)	12, 24
33 U.S.C. 1365(c)	12
33 U.S.C. 1365(e)	4, 5, 7, 12, 17, 25, 37
33 U.S.C. 1365(g)	15
33 U.S.C. 1369	25
33 U.S.C. 1369(b)(1)	11
33 U.S.C. 1371(c)	5
Comprehensive Environmental Response, Compensation and Liability Act of 1980 (or "Superfund"), H.R. 7020, 96th Cong., 2d Sess. (1980)	35
Section 107(j)	35
Deepwater Port Act of 1974, 33 U.S.C. 1515	12
Endangered Species Act of 1973, 16 U.S.C. 1540(g)	11

Constitution, treaty, statutes and rule—Continued Page

Extension of Admiralty and Maritime Jurisdiction Act, 46 U.S.C. 740 ..... 3, 5
Federal Tort Claims Act (FTCA), 28 U.S.C. 1291 *et seq.*:
28 U.S.C. 1346(b) 3
28 U.S.C. 2671 *et seq.* 3
Federal Water Pollution Control Act, 33 U.S.C. (1970 ed.) 1151 *et seq.* 10
Fishery Conservation and Management Act of 1976, 16 U.S.C. 1801 *et seq.* 31
Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA), 33 U.S.C. 1401 *et seq.* 2, 3
33 U.S.C. 1401(a) 33
33 U.S.C. 1401(b) 22, 33
33 U.S.C. 1411 31
33 U.S.C. 1412-1414 11
33 U.S.C. 1412(a) 23
33 U.S.C. 1412(a)(C) 23
33 U.S.C. 1415 11
33 U.S.C. 1415(g) 1, 4, 6, 11, 4a
33 U.S.C. 1415(g)(1) 12
33 U.S.C. 1415(g)(2) 12, 24
33 U.S.C. 1415(g)(2)(A) 12, 24
33 U.S.C. 1415(g)(5) 4, 6, 7, 12, 17, 25, 37
National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* 3
Noise Control Act of 1972, 42 U.S.C. 4911 11
Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.* 31
Resource Conservation and Recovery Act of 1976, 42 U.S.C. (& Supp. II) 6972 11
Rivers and Harbors Act of 1899, Section 13, 33 U.S.C. 407 ..... 3, 4
Safe Drinking Water Act, 42 U.S.C. (& Supp. I) 300j-8 12
Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1270 12

Constitution, treaty, statutes and rule—Continued Page

Toxic Substances Control Act, 15 U.S.C. 2619-2620 12
28 U.S.C. 1331 ..... 4, 6, 26
28 U.S.C. 1331(a) 3
28 U.S.C. 1332 3
28 U.S.C. 1333 7
28 U.S.C. 1333(1) 3, 5
28 U.S.C. 1337 3
28 U.S.C. 1343 3
28 U.S.C. 1361 3
42 U.S.C. 1983 3
Fed. R. Civ. P. 12(b) 4

Miscellaneous:

116 Cong. Rec. (1970):

p. 33102 20
p. 33104 20

126 Cong. Rec. H11803 (daily ed. Dec. 3, 1980) 35
126 Cong. Rec. S15009 (daily ed. Nov. 24, 1980) 35
126 Cong. Rec. S14954 (daily ed. Nov. 24, 1980) 35
Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rec. 383 (1964) 31
H.R. 11896, 92d Cong., 2d Sess., Section 505(g) (1972) 16
H.R. Rep. No. 92-361, 92d Cong., 1st Sess. (1971) .. 18
H.R. Rep. No. 92-911, 92d Cong., 2d Sess. (1972) .. 16
H.R. Rep. No. 92-1401, 92d Cong., 2d Sess. (1972) .. 37
Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 Colum. L. Rev. 1024 (1967) 33-34
1 Legislative History of the Federal Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. (Comm. Print 1973) 16, 17, 37
W. Prosser, *Law of Torts* (4th ed. 1971) 36
Restatement (Second) of Torts (1979) 36
S. Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. (1972) 15

Miscellaneous—Continued Page

S. Rep. No. 91-1196, 91st Cong., 2d Sess. (1970).. 19
S. Rep. No. 92-414, 92d Cong., 1st Sess. (1971).....18, 19, 21, 24, 25
S. Rep. No. 92-451, 92d Cong., 1st Sess. (1971)..... 18, 23
Woods & Reed, *The Supreme Court and Interstate Environmental Quality: Some Notes on the* Wyandotte *Case*, 12 Ariz. L. Rev. 691 (1970).... 30

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a)[1] is reported at 616 F.2d 1222. The opinion of the district court (Pet. App. 35a-59a) is unofficially reported at 12 E.R.C. 1118.

JURISDICTION

The judgment of the court of appeals (Pet. App. 32a-34a) was entered on February 5, 1980. The petition in No. 79-1711 was filed on April 29, 1980, and the petitions in Nos. 79-1754 and 79-1760 were filed on May 5, 1980. On April 24, 1980, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari in No. 80-12 to and including July 4, 1980, and that petition was filed on July 3, 1980. All petitions were granted on October 20, 1980, limited to the questions stated herein (J.A. 48a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 505 of the Clean Water Act, 33 U.S.C. 1365, and Section 105(g) of the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. 1415(g), are set forth in the Appendix, *infra*.

STATEMENT

1. Respondent National Sea Clammers Association is an association whose members earn their living harvesting fish and shellfish in the Atlantic Ocean off the coast of New York and New Jersey. Respondent Gosta Lovgren is an individual member of the

[1] "Pet. App." refers to the appendix in No. 80-12.

association. On January 14, 1977, those two respondents brought suit, on behalf of themselves and all others similarly situated, against petitioners in the United States District Court for the District of New Jersey.

The complaint alleges that the City of New York and other New York and New Jersey municipalities in the New York City metropolitan area discharge sewage, dredge spoil, and other toxic materials into the Hudson River and New York Harbor and that the discharged waste eventually is carried into the Atlantic Ocean (J.A. 23a). It is further alleged that various municipalities and the Army Corps of Engineers dump toxic substances directly into the Atlantic Ocean (J.A. 23a-24a). Some of these discharges and dumpings are said to be authorized by permits issued by the Corps of Engineers and by the Environmental Protection Agency pursuant to the Clean Water Act, 33 U.S.C. 1251 *et seq.*,[2] and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. 1401 *et seq.* (J.A. 23a-24a, 30a-32a), whereas other discharges and dumpings are alleged to be in violation of permits that have been issued (J.A. 37a).

The complaint alleges that these pollutants caused a massive growth of algae in 1976 in an area extending more than twenty miles offshore from Long Island to Cape May, New Jersey (J.A. 25a). The claim is that when this algae mass bloomed and died it settled on the ocean floor, and its decomposition

---

[2] The Clean Water Act refers to the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566. See also Act of Dec. 28, 1973, Pub. L. No. 93-207, 87 Stat. 906; Act of Nov. 2, 1978, Pub. L. No. 95-576, 92 Stat. 2467.

created an oxygen deficiency that caused severe damage to marine life in the area (Pet. App. 3a). The complaint charges that the discharges and dumpings "have caused and continue to cause massive destruction of marine plant life, fish, clams, lobsters and other marine life unable to escape and thereby, has caused and continues to cause the collapse of the fishing, clamming and lobster industries which operate in the waters of the Atlantic Ocean" (J.A. 26a).

The complaint alleges violations of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, the Clean Water Act, 33 U.S.C. 1251 *et seq.*, the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA or "Ocean Dumping Act"), 33 U.S.C. 1401 *et seq.*, Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. 407, the federal common law of nuisance, the Fifth, Ninth and Fourteenth Amendments to the Constitution and New York and New Jersey statutes. The jurisdiction of the district court is invoked under 28 U.S.C. 1331(a), 1332, 1337, 1343 and 1361, 42 U.S.C. 1983, the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 28 U.S.C. 2671 *et seq.*, the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, the Extension of Admiralty and Maritime Jurisdiction Act, 46 U.S.C. 740, and under 28 U.S.C. 1333(1). The relief sought includes the imposition of fines and penalties against the dischargers to be paid in part to the plaintiffs (J.A. 42a, 45a), a declaration that the federal petitioners have failed to comply with the requirements of the Clean Water Act, MPRSA and NEPA (J.A. 42a), mandamus to compel the federal petitioners to revoke all permits allowing discharges into New York Harbor, the Hudson River and the Atlantic Ocean (J.A. 43a) and an injunction against

the dischargers to prevent further dumping (J.A. 43a-44a). In addition, the complaint seeks $250 million in actual damages and $250 million in punitive damages to be "assessed against defendants jointly and severally" (J.A. 41a).

2. Petitioners moved to dismiss the claims under Fed. R. Civ. P. 12(b). The district court treated the motion as one for summary judgment and ordered the complaint dismissed with prejudice, except that some of the state law claims were dismissed without prejudice (Pet. App. 60a-61a).

The district court dismissed the claims under the Clean Water Act and the MPRSA for lack of jurisdiction because the plaintiffs did not comply with the procedural requirements of the citizen suit provisions of those Acts, 33 U.S.C. 1365 and 33 U.S.C. 1415(g), in particular the requirement that 60 days' notice be given to EPA and to the alleged violator prior to the commencement of suit (Pet. App. 45a-46a). The court rejected the argument that jurisdiction exists under 28 U.S.C. 1331 over an implied right of action derived from the savings clauses of those statutes, 33 U.S.C. 1365(e) and 1415(g)(5), which is not subject to the specific requirements of the citizen suit provisions, ruling that "[t]he manifest purpose of the savings clause seems to be the preservation of existing rights, not the creation of new ones" (Pet. App. 49a). The court also dismissed the claim under the federal common law of nuisance on the ground that private parties lack standing to raise such a claim (*id.* at 40a-41a).

As to the other claims, the court held that no private right of action exists under Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. 407 (Pet. App. 41a-42a), and that the complaint did not state

a claim of a violation of a constitutional right or any property interest cognizable under the Fifth Amendment (*id.* at 51a-53a). It also ruled that EPA could not be liable for a violation of NEPA because of the specific exemption contained in 33 U.S.C. 1371(c) (*id.* at 50a) and that there was no basis for suit under the Extension of Admiralty and Maritime Jurisdiction Act, 46 U.S.C. 740 (*id.* at 53a). Finally, the court rejected the claim that admiralty jurisdiction existed under 28 U.S.C. 1333(1) over a maritime tort action for nuisance, ruling that the pleadings did not allege a cause of action in maritime tort and, even if they did, such a claim would be barred because the plaintiffs had not complied with the requirements for suit under the FTCA or the relevant state tort claim statutes (*id.* at 53a-57a).

3. The court of appeals reversed in part, reinstating the claims under the Clean Water Act, the MPRSA, the federal common law of nuisance and in maritime tort.[3] With respect to the claim under the Clean Water Act, the court of appeals agreed that the district court had no jurisdicion under 33 U.S.C. 1365 because the plaintiffs had not met the procedural requirements of the citizen suit provision (Pet. App. 4a-6a). However, in light of the savings clause, 33 U.S.C. 1365(e), the court found that the citizen suit provision was not the exclusive basis for jurisdiction under the Clean Water Act (Pet. App. 6a-11a). Applying the analysis of *Cort* v. *Ash*, 422 U.S. 66 (1975), the court of appeals noted that the plaintiffs were members of the " 'class for whose

[3] The court vacated the dismissal of the NEPA claim, remanding it for reconsideration in light of further development of the record (Pet. App. 28a-29a), and it affirmed the dismissal of the other claims.

especial benefit the statute was enacted' " (Pet. App. 13a) and implication of a private remedy on their behalf would be " 'helpful' to the effectuation of" the purposes of the Clean Water Act (*id.* at 15a). Accordingly, it concluded that an implied private right of action existed under the Clean Water Act on behalf of individuals injured by pollution in violation of those statutes (*id.* at 11a-16a). Because this implied right of action was unfettered by the procedural restrictions of the citizen suit provisions, the court of appeals held that the district court had jurisdiction to hear the statutory claim under 28 U.S.C. 1331. The court of appeals then examined the similar citizen suit provision of the MPRSA and ruled that it was indistinguishable from that of the Clean Water Act for these purposes. Thus, it held that the savings clause of the MPRSA, 33 U.S.C. 1415(g)(5), also preserved an implied private right of action under that statute, distinct from the citizen suit authorized by 33 U.S.C. 1415(g), that the district court had jurisdiction to entertain (Pet. App. 16a-18a).

The court of appeals also reinstated the plaintiffs' federal common law of nuisance claim, holding that private parties have standing to maintain such an action (Pet. App. 20a-24a). The court ruled that the federal cause of action established in *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), although that case itself involved a state as plaintiff, was applicable whenever there is a "clear and overriding federal interest in uniformity," regardless of the identity of the parties (Pet. App. 21a). In addition, the court held that the federal common law of nuisance gave rise to an action for damages in this case (*id.* at 23a-24a). Finally, the court ruled that the plaintiffs' complaint could be read as alleging a mari-

time tort over which the district court had admiralty jurisdiction under 28 U.S.C. 1333 (Pet. App. 24a-27a). With reference to these tort claims, the court of appeals agreed with the district court that the plaintiffs had failed to comply with the procedures required by the Federal Tort Claims Act, but did not decide whether sovereign immunity precluded the recovery of damages from the federal petitioners under a federal common law tort theory (*id.* at 27a-28a).

SUMMARY OF ARGUMENT

I.

The question whether a private right of action should be implied under a statute is basically one of legislative intent. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979). This Court has identified four factors, which are not to be given equal weight, as indicative of legislative intent in this context. *Cort* v. *Ash*, 422 U.S. 66, 78 (1975).

Under the Clean Water Act and the MPRSA, Congress enacted special citizen suit provisions, 33 U.S.C. 1365(e) and 33 U.S.C. 1415(g)(5), to permit private persons to sue to enforce those statutes. These provisions are carefully limited to permit only suits for injunctive relief and, in the case of the Clean Water Act, for civil penalties. The suits may be brought only for violations of established standards or regulations or to compel the Administrator to perform a mandatory duty. In addition, the provisions contain other requirements relating to notice, venue, and abstention from suit if government enforcement actions are pending. It is almost in-

conceivable that, at the same time that Congress enacted these citizen suit provisions, it intended that another private right of action be implied in favor of persons injured by pollution, free from the limitations of the expressly authorized right of action.

The plain language of the statutes, supported by the legislative history, indicates that Congress intended the citizen suit provisions to be the exclusive vehicle for private suits alleging violations of the Clean Water Act and the MPRSA. First, there is no evidence that Congress intended to restrict the citizen suit provisions to "private attorneys general," while permitting a broader cause of action under the statutes for persons suffering economic injury. Second, the common sense interpretation of the savings clauses, which is confirmed by the paraphrasing of the clauses in the Committee Reports, is that they are aimed only at preserving rights of action under *other* statutes or the common law and do not contemplate the existence of an implied cause of action under the Clean Water Act or MPRSA itself. Finally, the history of these statutes, and of the prototype citizen suit provision in the Clean Air Act, 42 U.S.C. (Supp. I) 7604, manifests Congress' intent that private actions outside the confines of the citizen suit provisions, such as suits for damages, not be available under the Clean Water Act or the MPRSA.

In light of the clear legislative intent, no further examination of the *Cort* factors is necessary. In any event, those factors indicate that no private right of action should be implied here. The plaintiffs are not members of a class for whose especial benefit these statutes were passed; the Clean Water Act and the MPRSA are statutes passed for the benefit of the general public. Moreover, the private right of action

found by the court of appeals conflicts with the purposes of the statutes in that it interferes with Congress' intended role for the agency in establishing and enforcing effluent standards. Accordingly, the court of appeals erred in finding an implied private right of action under the Clean Water Act and the MPRSA in addition to that provided in the citizen suit provisions.

II.

In *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), this Court held that a state could sue under the federal common law of nuisance to abate pollution in interstate waters. Although the Court explained that this remedy was necessary to protect a state's sovereign interest in unpolluted water, it noted that "it is not only the character of the parties that requires us to apply federal law." 406 U.S. at 105 n.6. As in *Illinois* v. *City of Milwaukee*, the nature of the pollution here requires the application of federal law. The quality of interstate water, as well as that of ocean waters, has always been a matter implicating an overriding federal interest, as evidenced by several federal environmental protection statutes. Moreover, application of state law to this interstate controversy, with its potential for inconsistent results, would be inappropriate.

There is no reason to prohibit the application of this federal law in suits brought by private parties. The United States is entitled to invoke the federal common law of nuisance as a plaintiff. And, in a different context, this Court has permitted a private party to bring a suit under federal law concerning the condition of an interstate stream. *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110-111 (1938). The right of a private party to

bring a federal common law of nuisance action, however, exists only where an overriding federal interest is implicated and where the plaintiff has suffered damage that is different in kind from that suffered by the general public.

III.

The Clean Water Act expressly saves all other remedies at common law. The legislative history makes specific mention of pending actions under the federal common law of nuisance and notes that the ability to bring such actions will not be affected by the Clean Water Act. Thus, it is apparent that Congress did not intend to preempt the federal common law of nuisance in passing the Clean Water Act. The MPRSA contains a similar savings clause, and nothing in its legislative history contradicts the conclusion that the MPRSA also intended to preserve all other remedies, including the federal common law of nuisance.

ARGUMENT

I. NO PRIVATE RIGHT OF ACTION CAN BE IMPLIED UNDER THE CLEAN WATER ACT OR THE MPRSA APART FROM THE CITIZEN SUITS EXPLICITLY PROVIDED FOR IN THOSE STATUTES

In 1972, Congress passed the Clean Water Act as a means of exerting greater federal supervision over the preservation of water quality in the navigable waters of the United States.[4] The Act directs the Administrator of EPA to set effluent limitations for

[4] Prior to 1972, the original Federal Water Pollution Control Act had assigned to the states the primary responsibility for the development of water quality standards and enforcement. See 33 U.S.C. (1970 ed.) 1151 *et seq.*

various categories of "point sources," outlets from which pollutants are discharged into the water. 33 U.S.C. (& Supp. I) 1311(b). See generally *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977). It is unlawful for any person to discharge pollutants into the Nation's waters without a permit issued by EPA (or a state agency authorized by EPA to issue permits), which incorporates the effluent limitations and other applicable requirements. 33 U.S.C. (& Supp. I) 1342. In addition to the customary opportunity for private participation in the administrative process, the Clean Water Act provides for judicial review of EPA decisions setting effluent limitations and issuing or denying permits. 33 U.S.C. 1369(b)(1). See generally *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980). The MPRSA establishes a similar permit program governing the transportation of waste material from the United States for dumping in the ocean waters. 33 U.S.C. 1412-1414.

The Clean Water Act and the MPRSA provide for actions by the government to enforce the water quality standards and permit systems. See 33 U.S.C. (& Supp. I) 1319; 33 U.S.C. 1415. In addition, however, they provide for limited public participation in enforcement by means of citizen suits. 33 U.S.C. 1365; 33 U.S.C. 1415(g). The citizen suit provision of each statute is modeled on a prototype provision enacted in 1970 as part of the Clean Air Act, 42 U.S.C. (Supp. I) 7604, but they are not identical.[5]

---

[5] Several other statutes also contain citizen suit provisions modeled on the Clean Air Act. See Noise Control Act of 1972, 42 U.S.C. 4911; Resource Conservation and Recovery Act of 1976, 42 U.S.C. (& Supp. II) 6972; Endangered Species Act of 1973, 16 U.S.C. 1540(g); Safe Drinking

Under the Clean Water Act, a citizen may sue any person who is violating an effluent limitation or related order of the Administrator, and the federal district courts have jurisdiction of such suits to enforce the effluent limitation or order or to assess civil penalties against the violator. 33 U.S.C. 1365(a)(1). A citizen may also sue to compel the Administrator to perform a non-discretionary duty. 33 U.S.C. 1365 (a)(2). Under the MPRSA, a citizen may sue in federal district court to enjoin any person from violating any limitation or permit established or issued under the Act. 33 U.S.C. 1415(g)(1). In addition to the limitations on the nature of the suit and the type of relief available, the provisions contain additional restrictions on this private right of action: a requirement that 60 days' notice be given to the Administrator and the alleged violator before a suit is filed (33 U.S.C. 1365(b); 33 U.S.C. 1415 (g)(2)(A)); a prohibition against bringing the suit if the government is diligently prosecuting an enforcement action (33 U.S.C. 1365(b)(1)(B); 33 U.S.C. 1415(g)(2)); and a limitation of venue in the Clean Water Act to the district in which the violation occurs (33 U.S.C. 1365(c)). Finally, both statutes contain a savings clause to the effect that the citizen suit provision does not restrict any person's right to sue "under any statute or common law to seek enforcement * * * or * * * any other relief." 33 U.S.C. 1365(e); 33 U.S.C. 1415(g)(5).

Focusing on the Clean Water Act, the court of appeals held that the citizen suit provision is not the

---

Water Act, 42 U.S.C. (& Supp. I) 300j-8; Toxic Substances Control Act, 15 U.S.C. 2619-2620; Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1270; Deepwater Port Act of 1974, 33 U.S.C. 1515.

exclusive basis for private suits under the Act. The court stated that the citizen suit provision is designed to permit non-injured parties to sue as "private attorneys general" to enforce the provisions of the Act without meeting the $10,000 jurisdictional amount requirement. Thus, the court concluded, the citizen suit provision has no application to a suit by a private party who is injured by the alleged violation; the savings clause preserves his right to sue without regard to the limitations of the section (Pet. App. 8a-9a). Applying the analysis of *Cort* v. *Ash, supra,* the court of appeals found that the Clean Water Act created an implied private right of action for persons injured by violations of the Act (Pet. App. 11a-15a). In our view, this conclusion is erroneous.

The standards for determining when a private right of action should be implied under a statute are well established; it is basically a matter of statutory construction. *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11, 15 (1979); *Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 568 (1979); *Cannon* v. *University of Chicago,* 441 U.S. 677, 688 (1979). This Court has identified four factors as being relevant to this determination because they are indicative of legislative intent. *Cannon* v. *University of Chicago, supra,* 441 U.S. at 688; *Cort* v. *Ash, supra,* 422 U.S. at 78. Briefly, those factors are (1) whether the plaintiffs come within the class of persons for whose especial benefit the statute was enacted; (2) whether there is any express or implicit indication of congressional intent to create or deny such a cause of action; (3) whether the existence of or right to bring such an action would be consistent with the purposes of the legislative scheme; and (4) whether the cause of action involves a matter traditionally

relegated to state law, in an area basically of concern to the States, so that it would be inappropriate to infer a federal cause of action. Because "[t]he central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action," however, the four *Cort* factors are not of equal significance. *Touche Ross & Co.* v. *Redington, supra*, 442 U.S. at 575. Where the congressional intent not to create a private right of action is clear, it is of no relevance whether such an action might be deemed a useful adjunct to the legislative scheme or whether or not the subject matter of the statute is traditionally a state concern. See *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra*, 444 U.S. at 15-16; *Touche Ross & Co.* v. *Redington, supra*, 442 U.S. at 575-576, 578. In our view, the court of appeals misapplied these principles by failing to recognize Congress' manifest intent to limit the private right of action created by the Clean Water Act and MPRSA.

A. The Clean Water Act And The MPRSA Draw No Distinction Between Plaintiffs Based On The Type Of Injury Alleged

The starting point of the analysis must be the statutory scheme itself. See *Touche Ross & Co.* v. *Redington, supra*, 442 U.S. at 568. The very existence of the detailed citizen suit provision belies the notion that another right of action should be implied under the statutes. As this Court has remarked, "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra*, 444 U.S. at 19; see also *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458

(1974). In this case, not only do the statutes expressly provide a remedy, but that remedy is one exclusively designed for *private* parties and subject to carefully articulated limitations. It strains credulity to imagine that Congress expressly established a private right of action subject to restrictions, while " 'absentmindedly [forgetting] to mention' " the creation of a second private right of action free from those restrictions. See *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra*, 444 U.S. at 20. Surely, Congress' failure to make an explicit reference to this second right of action suggests that it had no intent to create it.

The court of appeals failed to draw this obvious inference from the express provision of a private remedy because it felt that the citizen suit provisions in no way concern the rights of persons actually injured by violations of the statutes (Pet. App. 8a). But the language and legislative history of these statutes provide no support for the distinction drawn by the court of appeals, *i.e.*, that the citizen suit provisions were designed to apply exclusively to suits by non-injured "private attorneys general," while persons actually injured could invoke an implied right of action. Indeed, the legislative history of the Clean Water Act provides strong evidence to the contrary.

As the court of appeals pointed out (Pet. App. 6a-8a), the definition of "citizen" in 33 U.S.C. 1365(g)[6] was intended to incorporate this Court's interpretation of Section 10 of the Administrative Procedure Act, 5 U.S.C. 702, in *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). See S. Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. 146 (1972). Thus, a suit by persons

[6] A "citizen" is defined for the purpose of a citizen suit as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. 1365(g).

who suffer non-economic injury is permitted under the citizen suit provision. But, contrary to the finding of the court of appeals, the citizen suit provision is not restricted solely to these types of suits.[7] The inclusion of the *Sierra Club* standard in the Act represented an extension of the narrower citizen suit provision contained in the House bill. That provision had included a requirement that a person's "direct interest" be affected in order to be eligible to sue,[8] and therefore it had been criticized as limiting the availability of the citizen suit provision to "persons owning property which is directly affected by the pollution." H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 407-409 (1972), *reprinted in* 1 Legislative History of the Federal Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. 876-878 (Comm. Print 1973) (hereinafter "Leg. Hist.") (additional views of Reps. Abzug and Rangel). See also *id.* at 417, 1 Leg. Hist. 886.

---

[7] The court of appeals stated that the citizen suit provisions apply only to "non-injured" members of the public (Pet. App. 8a). It is clear, however, that Congress considered any person eligible to sue under the *Sierra Club* test as being "injured." See, *e.g.*, 1 Legislative History of the Federal Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. 179 (Comm. Print 1973). The distinction drawn by the court of appeals thus seems to be between economic and non-economic injury.

[8] Section 505(g) of the House bill provided:

> For the purposes of this section the term "citizen" means (1) a citizen (A) of the geographic area and (B) having a direct interest which is or may be affected, and (2) any group of persons which has been actively engaged in the administrative process and has thereby shown a special interest in the geographic area in controversy.

H.R. 11896, 92d Cong., 2d Sess. (1972), 1 Leg. Hist. 1077.

In sum, the provision as enacted did not create a special rule for non-economic injury. On the contrary, it equated economic injury, which had been covered even under the House version, with non-economic injury for the purposes of citizen suits. As Senator Muskie, who was perhaps the primary author of the Clean Water Act (see *E. I. du Pont de Nemours & Co.* v. *Train*, *supra*, 430 U.S. at 129), stated in his explanation of the Conference Report, "a citizen suit may be brought only by those persons or groups which are among those whose interest (whether environmental or economic) is or may be injured by the violation of the Act which is the basis for the suit." 1 Leg. Hist. 179. Although, as Senator Muskie stated, "a noneconomic interest in the environment, in clean water, is a sufficient base for a citizen suit," 1 Leg. Hist. 221, Congress clearly intended that an economic interest as well could give rise to a citizen suit under 33 U.S.C. 1365.

B. Congress Had No Intent To Create A Private Remedy Under These Statutes Other Than That Specified In the Citizen Suit Provisions

According to the court of appeals, the independent remedy for persons economically injured by violations of the pollution statutes is provided by the savings clauses, 33 U.S.C. 1365(e), 33 U.S.C. 1415(g)(5) (Pet. App. 9a). Although the clauses do refer to saving a right to sue under "any statute," the court's interpretation defies common sense. A savings clause does not create new remedies; it preserves ones that are already in existence. It is a distortion of the concept of a savings clause to say that a statute "saves" a remedy that is being created—especially implicitly—by the very same statute. Thus, it seems

clear that in enacting the savings clauses of the Clean Water Act and MPRSA, Congress was focusing on preexisting remedies under other statutes and the common law, not intimating that another private remedy should be created by implication under these statutes.

This conclusion is supported by the legislative history of the statutes. The Committee Reports for both the Clean Water Act and the MPRSA, in discussing the savings clause, describe it as preserving rights "under any *other* law." S. Rep. No. 92-414, 92d Cong., 1st Sess. 81 (1971); S. Rep. No. 92-451, 92d Cong., 1st Sess. 23-24 (1971); H.R. Rep. No. 92-361, 92d Cong., 1st Sess. 23 (1971) (emphasis added). The court of appeals stated that it was "not persuaded that this paraphrase of the wording of the Act was intended to preclude the finding of a private remedy under the Act" (Pet. App. 14a). Undoubtedly, the court is correct in its view that the paraphrase in the legislative history was not *intended* to preclude the finding of a private remedy, but the consistent use of the word "other" in paraphrasing provides strong support for the common sense conclusion that Congress was focusing on rights under other laws in enacting the savings clause. Indeed, it is quite likely that Congress never even considered the possibility that another private right of action would be implied under the Clean Water Act and the MPRSA themselves, much less specifically intended to create such a remedy.

Moreover, the legislative history of the relevant statutes demonstrates Congress' intent that the citizen suit provisions be the exclusive vehicle for a private right of action. Because the citizen suit provisions involved here are closely modeled on those of

the Clean Air Act (see S. Rep. No. 92-414, *supra*, at 79), the legislative history of the Clean Water Act and the MPRSA generally focus only on the differences between their provisions and those of the prototype. To understand the general principles underlying these citizen suit provisions, it is necessary to turn to the legislative history of the Clean Air Act itself.

The legislative history of the Clean Air Act clearly indicates that private rights of action under the Act were limited to those authorized by the citizen suit provision. The Senate Report noted that citizen actions would be "carefully restricted to actions where violations of standards and regulations or a failure on the part of officials to act are alleged." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 36 (1970). Accordingly, the Report concluded that inconsistent enforcement would not be engendered by citizen suits because the standard to be met would already have been established in the agency proceeding, and therefore the issue before the court would simply be "a factual one of whether there had been compliance." *Id.* at 38. In addition, the Report made it clear that there was no "provision for the recovery of property or personal damages." *Ibid.*

Despite these limitations, there was some concern expressed on the floor of the Senate over the possibility that the passage of the Clean Air Act Amendments would lead to a flood of private lawsuits that would increase the burden on the federal courts. In response, Senator Muskie explained the limited scope of the citizen suit provision contained in S. 4358, which was ultimately enacted as part of the Clean Air Act, by comparing it to a broader citizen suit provision that had been contained in S. 3201, an earlier version of the bill:

> Senate bill 3201 * * * is a class action bill. S. 4358 is not. S. 4358 is limited to citizens acting on their own behalf.
>
> Senate bill 3201 provides damages and a remedy for recovery of fines and restitution, and other monetary damages. The pending bill is limited to seek abatement of violation of standards established administratively under the act, and expressly excludes damage actions.
>
> Senate bill 3201 provides for redress of consumer injury. The pending bill is limited to an action for enforcement on abatement of violations of administratively set standards.

116 Cong. Rec. 33102 (1970).

Later in this discussion, Senator Hart also responded to these concerns by emphasizing that the bill did not permit a private suit for damages:

> It has been argued, however, that conferring additional rights on the citizen may burden the courts unduly. I would argue that the citizen suit provision of S. 4358 has been carefully drafted to prevent this consequence from arising. First of all, it should be noted that the bill makes no provision for damages to the individual. It therefore provides no incentives to suit other than to protect the health and welfare of those suing and others similarly situated.

116 Cong. Rec. 33104 (1970).

Thus, there can be no doubt that Congress specifically intended that a suit such as that brought by the plaintiffs in this case, seeking redress for alleged consumer injury through damages and other relief not authorized by the citizen suit provision, could not be maintained under the Clean Air Act. Nothing in the language or the legislative history of the Clean Water Act or the MPRSA suggests that

Congress intended to work such a major alteration in this scheme of citizen participation in enforcement—a scheme that to all appearances was superimposed without significant change upon the water pollution statutes—as authorizing private parties to sue for damages for injuries caused by statutory violations. And it is almost inconceivable that Congress would effect such a major change by implication, only two years after deliberately refraining from permitting such suits because of a recognized danger of increasing the burden of the courts.

Moreover, the legislative history of the Clean Water Act buttresses the conclusion that, as under the Clean Air Act, no private right of action exists apart from the citizen suit provision. The Senate Report notes that "[a]s in [the Clean Air] Act, the provision in this bill is carefully restricted to actions where violations of standards and regulations or a failure on the part of officials to act are alleged." S. Rep. No. 92-414, *supra*, at 79. As under the Clean Air Act, the only issue before the court in a citizen suit would be whether a polluter has complied with an administratively set standard. *Id.* at 80. With respect to the one modification made in the nature of the remedies available, the addition of civil penalties, the Report specifically noted that "any penalties imposed would be deposited as miscellaneous receipts and not be recovered by the complainant." *Id.* at 79. There was no provision in the Act for the recovery of damages, but, under the savings clause, "if damages could be shown, other remedies would remain available." *Id.* at 81.

C. Application Of the *Cort* Factors Also Suggests That No Private Right Of Action Should Be Implied

In light of the clear legislative intent not to create a private right of action apart from the citizen suit provisions, as evidenced by the statutes themselves and the pertinent legislative history, there is no need to consider the other *Cort* factors. See *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, 444 U.S. at 15-16; *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 575-576, 578. In any event, an examination of those factors supports the conclusion that the court of appeals erred in implying a private cause of action.

The court of appeals found, without discussion, that "individuals likely to suffer actual injury by the pollution" was the class for whose *especial* benefit the Clean Water Act was enacted (Pet. App. 13a). This statement apparently refers to economic injury. See note 7, *supra*. It would appear, however, that the Clean Water Act and the MPRSA were enacted to protect a much broader class of persons than those who derive their livelihood from the water. The objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" toward the goal of providing "for the protection and propagation of fish, shellfish, and wildlife" and "recreation in and on the water." 33 U.S.C. 1251(a). The policy of the MPRSA is "to prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities." 33 U.S.C. 1401(b). Both statutes certainly recognize that one of the benefits and goals of improved water quality is the protection of fish and

that the failure to protect fish can have adverse economic consequences on individuals. See 33 U.S.C. (Supp. I) 1364(a); 33 U.S.C. 1412(a)(C). But the statutes exhibit a much broader purpose than simply protecting the livelihood of fishermen. Congress clearly was also concerned with non-economic issues, such as alleviating dangers to human health, wildlife, beaches and ecological systems generally, as well as with preserving esthetic and recreational values. See, *e.g.*, 33 U.S.C. (& Supp. I) 1314(a); 33 U.S.C. 1412 (a). Under the MPRSA, the legislative history indicates Congress' particular concern over the long-term dangers of deterioration of ocean waters and the marine ecosystem. See S. Rep. No. 92-451, *supra*, at 9-13. Under these circumstances, the Clean Water Act and the MPRSA are best described as statutes enacted for the benefit of the general public. See *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 690. The fact that the plaintiffs derive a more direct economic benefit from these statutes than most members of the general public does not militate in favor of implying a private right of action in their favor under the first *Cort* factor.

With respect to the third *Cort* factor, the court of appeals simply found that implication of a second private right of action would be "helpful" to the purposes of the Clean Water Act (Pet. App. 15a). Of course, the institution of any lawsuit based on the violation of a statute will be of some assistance in enforcing the statute. To that extent, the plaintiffs' action furthers the purposes of the underlying statutes here. However, if this benefit is sufficient to justify the implication of a private right of action under a statute, such causes of action would be implied under all statutes. Clearly, a more searching

inquiry into the purposes of the statute is necessary. In this case, the statutory schemes and the legislative history indicate that the private right of action implied by the court of appeals is at odds with the purposes of the Clean Water Act and the MPRSA.

First, the primary responsibility for enforcement of the Clean Water Act and the MPRSA rests with the government. Citizen suits have been established as a supplement to government enforcement, but Congress restricted these private suits so as not to interfere with that enforcement. Because of this deference to the agency, citizen suits may not be brought if agency enforcement proceedings under the statute are pending. See 33 U.S.C. 1365(b)(1)(B); 33 U.S.C. 1415(g)(2). The 60-day notice provision (33 U.S.C. 1365(b); 33 U.S.C. 1415(g)(2)(A)), which gives the agency an opportunity to institute administrative or judicial proceedings before a citizen suit is filed, was included specifically "to further encourage and provide for agency enforcement." S. Rep. No. 92-414, *supra*, at 79. A private right of action for statutory violations that is free from the restrictions of the citizen suit provisions would disrupt this preference for agency enforcement. It would permit private lawsuits to go forward before the agency has had an opportunity to decide if judicial enforcement is advisable, and it could allow for duplicative lawsuits where an agency enforcement action is instituted.

Second, Congress clearly intended to restrict private suits alleging violations of these statutes to the issue of enforcement of standards and regulations already established through the administrative process. Thus, a citizen suit, as contemplated by Congress, does not require the reevaluation of technical data at the enforcement stage; "[t]hese matters will

have been settled in the administrative procedure leading to the establishment" of an effluent limitation. S. Rep. No. 92-414, *supra*, at 79. However, under the court of appeals' decision, private suits may be brought that challenge already settled agency action, such as the effluent standards involved in this case. Such suits would seriously infringe on the responsibilities and role of the agency as delineated by Congress, because the technical questions of proper effluent limitations under the statute would be before the courts although they had already been decided administratively.[9] See generally S. Rep. No. 92-414, *supra*, at 80-81.[10]

This is not a case where Congress has been silent concerning the interaction between private and agency enforcement. Congress carefully considered the possible tension between the two types of enforcement, and it limited the availability of private suits based on statutory violations so as to preserve the agency role contemplated by the pollution control statutes. Elimination of those limitations for certain classes of private suits would seriously undermine the statutory scheme.

---

[9] These administrative determinations are, of course, subject to judicial review at the time they are made. See 33 U.S.C. 1369.

[10] We do not suggest, of course, that a challenge to a discharge of pollutants is prohibited simply because a permit has been issued for that discharge through the agency process. A discharge may still be subject to challenge because it violates standards established by state statute or by the common law, either state or federal. See 33 U.S.C. 1365(e); 33 U.S.C. 1415(g)(5). But no private action may be brought under the Clean Water Act or the MPRSA, claiming a violation of those statutes, against a discharger who is complying with a properly issued permit.

The fourth *Cort* factor is somewhat equivocal and sheds no light on the issue. The condition of the navigable waters of the United States is an area of important federal concern, but water pollution and private actions seeking relief from it are areas that traditionally have been the concern of state law as well. In sum, analysis of the *Cort* factors clearly indicates that no private right of action should be implied under the Clean Water Act or the MPRSA.

The only court of appeals to consider the question is in accord with this conclusion. The Seventh Circuit, applying the *Cort* factors, has concluded that no private right of action can be implied under the Clean Water Act. *City of Evansville* v. *Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1012-1016 (1979), cert. denied, 444 U.S. 1025 (1980). That court, although not focusing on the question of an implied remedy, has also held that the 60-day notice requirement is a bar to any private suit under the Clean Air Act. *City of Highland Park* v. *Train*, 519 F.2d 681 (7th Cir. 1975).[11]

---

[11] The two cases on which the court of appeals relied, *Natural Resources Defense Council* v. *Callaway*, 524 F.2d 79 (2d Cir. 1975), and *Natural Resources Defense Council* v. *Train*, 510 F.2d 692 (D.C. Cir. 1974), did not consider the question of an implied private right of action. Those cases held that the citizen suit provision was not the exclusive *jurisdictional* basis for suits under the Clean Water Act; the savings clause preserved the right to invoke jurisdiction under 28 U.S.C. 1331. This conclusion is correct, but 28 U.S.C. 1331 can be invoked only if the plaintiff has a cause of action "arising under federal law." A private party has no cause of action "arising under" the Clean Water Act or MPRSA except as provided in and limited by the citizen suit provisions.

Because Congress did not intend to permit such suits, the bulk of the plaintiffs' statutory claims, notably those seeking damages and those challenging properly issued permits, were correctly dismissed by the district court for failure to state a claim. Some portions of the complaint, notably those seeking enforcement of existing permits, advance claims that are maintainable under the citizen suit provisions of the Clean Water Act and the MPRSA. These claims are subject to the restrictions of those provisions, however, and they were correctly dismissed by the district court because of the plaintiffs' failure to comply with those restrictions.

II. A PRIVATE PARTY HAS STANDING TO BRING AN ACTION FOR DAMAGES UNDER THE FEDERAL COMMON LAW OF NUISANCE

This case also presents the question of the correctness of the court of appeals' holding (Pet. App. 20a-24a) that private parties may bring an action in federal court based on a violation of the federal common law of nuisance. As we explained in our brief in response to the petitions in Nos. 79-1711, 79-1754 and 79-1760, the resolution of this issue is of limited direct concern to the federal petitioners in this case because of other issues not passed upon by the court of appeals and not presented here. That is so because, in discussing the plaintiffs' common law claim, the court of appeals focused on its nature as a suit for damages, and sovereign immunity precludes such relief against the federal government.[12] More-

[12] The court of appeals did not rule on the sovereign immunity question because the parties had not addressed the question (Pet. App. 28a). The First Circuit, however, has held that sovereign immunity does insulate the federal gov-

over, with respect to the injunctive relief sought by the plaintiffs, the complaint does not make out a prima facie case of nuisance against the federal petitioners based upon their administration of federal permit programs.[13] A public nuisance under common law may be created by a discharge of pollutants into public waters, but, clearly, a federal agency is not guilty of creating a public nuisance simply because, in the course of its administration of a regulatory program, it does not prohibit a discharge by a private party or issues a permit concerning such a discharge. However, because of the government's strong interest in preserving the quality of our Nation's waters, we are addressing this question, which bears on the remedies available to one who suffers from such pollution.

In *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), this Court held that the State of Illinois had a cause of action for injunctive relief under the federal common law of nuisance to abate pollution of Lake Michigan by the City of Milwaukee. Relying on a long line of cases, this Court stated that "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Id.* at 103. The court of appeals below rejected the contention that this common law remedy could be in-

---

ernment from a damage action under the federal common law of nuisance. *Commonwealth of Massachusetts* v. *United States Veterans Administration*, 541 F.2d 119, 123 (1976). See generally *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *Testan*, 424 U.S. 392, 399 (1976).

[13] The plaintiffs' allegations that they are being harmed by waste dumped by the Army Corps of Engineers might make out a prima facie nuisance claim to the extent it is not barred by sovereign immunity.

voked only when the plaintiff is a state, as in *Illinois* v. *City of Milwaukee* itself. In our view, the court of appeals correctly concluded that private parties do have standing to bring an action under the federal common law of nuisance in appropriate cases.

This Court explained in *Illinois* v. *City of Milwaukee, supra*, that a federal common law of nuisance remedy to abate pollution is necessary partly because of the nature of our federal system. Each state is entitled to protect its quasi-sovereign interest in unpolluted air and water. Because the states surrendered their diplomatic powers when they entered the Union, a federal judicial remedy is necessary for the resolution of interstate pollution disputes that infringe on the sovereignty of a state. 406 U.S. at 104-107. For this reason, a federal common law remedy was clearly appropriate where the State of Illinois was the plaintiff.

The Court explicitly noted, however, that "it is not only the character of the parties that requires us to apply federal law." 406 U.S. at 105 n.6. "[W]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism," it is appropriate to apply federal common law. *Ibid.* See also *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 426-427 (1964); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943). Resolution of disputes over interstate water has long been considered to implicate such an overriding federal interest. See, *e.g.*, *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110-111 (1938); *Kansas* v. *Colorado*, 206 U.S. 46, 98 (1907). And the need for application of federal law extends to disputes over pollution of interstate waters. See *Ver-*

mont v. *New York*, 417 U.S. 270, 275 n.5 (1974); *New Jersey* v. *City of New York*, 283 U.S. 473, 481-482 (1931); *New York* v. *New Jersey*, 256 U.S. 296, 301-303, 312-313 (1921); Woods & Reed, *The Supreme Court and Interstate Environmental Quality: Some Notes on the* Wyandotte *Case*, 12 Ariz. L. Rev. 691, 711-714 (1970). See also *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907) (air pollution). In light of these principles, this Court concluded that the need for application of federal law was "[c]ertainly * * * present" in an action concerning pollution of an interstate body of water such as Lake Michigan. *Illinois* v. *City of Milwaukee*, *supra*, 406 U.S. at 105 n.6.

In this case, the court of appeals specifically found that the plaintiffs have "sufficiently alleged pollution of interstate waters" (Pet. App. 22a) to require the application of federal standards because of the "clear and overriding federal interest in uniformity" (*id.* at 21a).[14] As in *Illinois* v. *City of Milwaukee*, *supra*, the elements are present here that require an application of federal law. The overriding federal interest in the quality of interstate waters has long been recognized and is emphasized by the congressional enactment of the Clean Water Act and other environmental protection statutes. See *Illinois* v. *City of*

---

[14] The complaint alleged damage "a few miles offshore" (J.A. 25a), and the court of appeals apparently treated this allegation as one encompassing the "territorial sea," in which the states have important property interests. The "territorial sea" extends three miles beyond the low-water line along the coast. Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, 1608, T.I.A.S. No. 5639 (1964). See *United States* v. *California*, 332 U.S. 19, 33-34 (1947). In addition, pollutants discharged in the State of New York traveled down the Hudson River into New Jersey waters. The municipal petitioners have not challenged the court's finding of interstate pollution.

Milwaukee, supra, 406 U.S. at 101-103. Moreover, application of state law could lead to inconsistent results, depending on the source of the pollution, and could force one state to be bound by the "more degrading standards" of another. *Id.* at 107. Federal law should apply here, as the court of appeals concluded, because "the interstate nature of [the] controversy makes it inappropriate that the law of either state should govern." Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 408 n.119 (1964).

In addition to the interstate aspects of this case, the allegation that discharges within the States of New York and New Jersey have caused pollution damage in the ocean waters surely implicates an important federal interest. This federal interest in areas beyond the territorial sea, and particularly in fishery resources, is apparent from the existence of several statutes in addition to the Clean Water Act and MPRSA. See, *e.g.*, 33 U.S.C. 1411; 33 U.S.C. (Supp. I) 1321(b); Fishery Conservation and Management Act of 1976, 16 U.S.C. 1801 *et seq.*; Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.* Thus, there can be little doubt that a federal standard must be applied to the plaintiffs' common law claim; the question raised here is whether, in spite of the existence of an overriding federal interest, a private party lacks standing to raise such a claim.[15]

---

[15] This case is therefore quite different from those cases where this Court has failed to find a right of action under federal law on behalf of a private party where no overriding federal interest was implicated. See *Bank of America* v. *Parnell*, 352 U.S. 29, 33-34 (1956); *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1, 16-17 (1888).

The right to invoke the federal common law of nuisance is not the exclusive province of individual states. Certainly, the United States can also sue in federal court to abate pollution in the navigable waters. In *In re Debs*, 158 U.S. 564, 580-587 (1895), this Court upheld the government's right, in the absence of a statute, to sue to enjoin an obstruction to interstate commerce (the Pullman strike) on the theory that it was a public nuisance in an area of federal concern. The Court noted that "a public nuisance has always been held subject to abatement at the instance of the government." *Id.* at 587. The same rule must extend to a nuisance on the Nation's waters, in light of the United States' "sovereign power * * * to control the navigable waters within its jurisdiction." *Sanitary District* v. *United States*, 266 U.S. 405, 425 (1925). See also *Kaiser Aetna* v. *United States*, 444 U.S. 164, 173, 177 (1979); *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 426 (1940). It can make no difference that the nuisance is pollution rather than an obstruction that interferes with navigability. Accordingly, the lower courts have uniformly recognized the existence of this right of action and have permitted the United States to sue under the federal common law of nuisance. See *Illinois* v. *Outboard Marine Corp.*, 619 F.2d 623 (7th Cir. 1980), petition for cert. pending, No. 80-126 (filed July 28, 1980); *United States* v. *Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3d Cir. 1974), cert. denied, 420 U.S. 927 (1975); *United States* v. *Atlantic-Richfield Co.*, 478 F. Supp. 1215, 1218-1220 (D. Mont. 1979); *United States* v. *Ira S. Bushey & Sons*, 346 F. Supp. 145, 149-150 (D. Vt. 1972), 363 F. Supp. 110, 120 (D. Vt.), aff'd, 487 F.2d 1393 (2d Cir. 1973) (Table), cert. denied, 417 U.S. 976

(1974); *United States ex rel. Scott* v. *United States Steel Corp.*, 356 F. Supp. 556, 558 (N.D. Ill. 1973); cf. *Reserve Mining Co.* v. *EPA*, 514 F.2d 492, 520-521 (8th Cir. 1975) (federal common law of nuisance claim rejected because of lack of interstate effect).

Where a federal body of law already exists for suits brought by a state or the United States, there is no reason to deny to a private party the right to invoke that law in a case where important federal interests are at stake.[16] This Court has not previously had occasion to consider a suit by a private party under the federal common law of nuisance, but it has permitted a suit by a private party under the closely related body of federal common law relating to apportionment of waters. In *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, *supra*, this Court granted certiorari in a case brought by a Colorado corporation against Colorado state waterway officials challenging the diversion of the waters of the La Plata River to the detriment of the plaintiff. The Court held that it had jurisdiction because questions concerning the apportionment of interstate streams are ones of "federal common law." 304 U.S. at 110. The Court concluded that "[j]urisdiction over controversies concerning rights in interstate streams is not different from those concerning boundaries. These have been recognized as presenting federal questions * * * in suits between private litigants." *Id.* at 110-111. See generally Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 Colum. L. Rev. 1024, 1030-1032

[16] Certainly, the federal statutory scheme explicitly recognizes the strong interest that individuals have in controlling water pollution. See 33 U.S.C. 1251(a)(1), (2); 33 U.S.C. 1401(a), (b).

(1967). Thus, there is generally no bar to a suit by a private party under federal common law, provided that the suit involves the overriding federal interest that led to the creation of the federal common law, such as the water quality of an interstate stream.[17]

The lower courts generally have agreed that the federal common law of nuisance action discussed in *Illinois* v. *City of Milwaukee*, *supra*, is not restricted to suits by a sovereign state or the United States. Two courts have held that a municipality or municipal corporation is entitled to bring such a suit. *City of Evansville* v. *Kentucky Liquid Recycling, Inc.*, *supra*, 604 F.2d at 1017-1019; *Township of Long Beach* v. *City of New York*, 445 F. Supp. 1203, 1214 (D.N.J. 1978). And one district court has held this right available to purely private parties. *Byram River* v. *Village of Port Chester*, 394 F. Supp. 618, 622 (S.D.N.Y. 1975). See also *Committee for Consideration of Jones Falls Sewage System* v. *Train*, 539 F.2d 1006, 1014-1016 (4th Cir. 1976) (Butzner, J., dissenting). But see *Committee for Consideration of Jones Falls Sewage System* v. *Train*, 375 F. Supp. 1148, 1153-1154 (D. Md. 1974), aff'd on different but not inconsistent grounds, 539 F.2d 1006 (4th Cir. 1976); cf. *Parsell* v. *Shell Oil Co.*, 421 F. Supp. 1275, 1281 (D. Conn. 1976), aff'd, 573 F.2d 1289 (2d Cir. 1977) (Table). In addition, Congress has

---

[17] This Court has also indicated that private parties may, "in appropriate situations," invoke the federal common law concerning government paper. See *Bank of America* v. *Parnell*, 352 U.S. 29, 34 (1956) ("We do not mean to imply that litigation with respect to Government paper necessarily precludes the presence of a federal interest, to be governed by federal law, in all situations merely because it is a suit between private parties.").

indicated its understanding that nuisance suits by private parties under the federal common law are permitted. The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (or "Superfund"), H.R. 7020, 96th Cong., 2d Sess., passed by the Senate on November 24, 1980, and by the House of Representatives on December 3, 1980,[18] establishes a fund to pay for the cleanup of hazardous wastes. The legislation explicitly refers to the rights of individuals to recover damages and cleanup costs under the common law, state and federal.[19]

The right of a private party to sue under the federal common law of nuisance, of course, is more circumscribed than that of a state or the United States. First, federal law will only be applied where there is an overriding federal interest. There may be cases, involving pollution within a state, where a nuisance action under state law may be adequate to vindicate the interest of a private plaintiff, although application of federal common law might be appropriate if suit were brought by the United States. Second, the right of a private party to sue for public nuisance has always been limited by the common law. Originally, the establishment of a public nuisance was a criminal offense and thus abatement of

---

[18] See 126 Cong. Rec. S15009 (daily ed. Nov. 24, 1980); 126 Cong. Rec. H11803 (daily ed. Dec. 3, 1980).

[19] Section 107(j) provides: "Recovery by any person * * * for response costs or damages * * * shall be pursuant to existing law * * *. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance." See 126 Cong. Rec. S14954 (daily ed. Nov. 24, 1980).

a nuisance was purely the concern of the state. See *Restatement (Second) of Torts* § 821B, Comment a (1979). Later, a private tort action developed, but the common law has always limited that tort action to cases where the plaintiff suffers an injury "different in kind" from the general public, such as pecuniary loss. See *Restatement (Second) of Torts, supra,* § 821C; W. Prosser, *Law of Torts* 586-591, 604 (4th ed. 1971).

In this case, neither of these limitations bars the plaintiffs' suit. The subject matter is the pollution of interstate waters and ocean waters, an area of overriding federal concern. The plaintiffs have alleged damage that is clearly different in kind from that of the general public—economic loss of their clamming business caused by the pollution.[20] Under these circumstances, the plaintiffs have established a cause of action under the federal common law of nuisance.

III. THE CLEAN WATER ACT AND THE MPRSA DO NOT PREEMPT THE FEDERAL COMMON LAW OF NUISANCE

Whether the federal common law of nuisance has been preempted by legislation is basically a question of legislative intent. We have argued in our brief in *City of Milwaukee* v. *People of the State of Illinois,* No. 79-408 (argued Dec. 2, 1980), that the passage of the Clean Water Act did not preempt the federal

---

[20] Indeed, the case of a commercial fisherman whose business is damaged by water pollution is one of the classic examples of an injury that is different in kind and gives rise to a private action for public nuisance. See W. Prosser, *supra,* at 590-591; *Restatement (Second) of Torts, supra,* § 821C, Comment h, Illustration 11; *Union Oil Co.* v. *Oppen,* 501 F.2d 558, 568 (9th Cir. 1974).

common law of nuisance, and we rely on that brief here. The plain language of the savings clause of the Clean Water Act, 33 U.S.C. 1365(e), indicates Congress' intent to preserve all common law remedies, and the legislative history makes clear that Congress understood that the federal common law would be preserved as well.[21]

The savings clause of the MPRSA, 33 U.S.C. 1415 (g)(5), is quite similar to that of the Clean Water Act. By its terms, it preserves all other causes of action, including those under the common law. The legislative history reveals no intent by Congress to eliminate the federal common law of nuisance or any other preexisting remedy. It seems plain that Congress did not intend to preempt the federal common law of nuisance in enacting the MPRSA. Nor does the existence of a common law remedy conflict with the purposes of the MPRSA. The standards of the MPRSA will, of course, be highly relevant in determining whether a nuisance exists. But, as under the Clean Water Act, the common law remedy may supplement the MPRSA by dealing with problems not covered by the Act and by providing a remedy for damages, which is not provided under the MPRSA. Thus, the MPRSA does not preempt the federal common law of nuisance.

---

[21] In addition to the legislative history discussed in our brief in *City of Milwaukee* v. *People of the State of Illinois*, *supra*, we note that Congressman Dingell, one of the co-sponsors of the Clean Water Act in the House, specifically referred to the availability of suits under the federal common law of nuisance, citing H.R. Rep. No. 92-1401, 92d Cong., 2d Sess. 31-33 (1972), which discussed two suits brought under the federal common law of nuisance. See 1 Leg. Hist. 252.

CONCLUSION

The decision of the court of appeals should be reversed with respect to the existence of an implied private right of action under the Clean Water Act and the MPRSA. The decision with respect to the federal common law of nuisance claim should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

ALAN I. HOROWITZ
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
RAYMOND N. ZAGONE
JACQUES B. GELIN
DAVID T. BUENTE, JR.
Attorneys

DECEMBER 1980

APPENDIX

Section 505 of the Clean Water Act, 33 U.S.C. 1365, provides in pertinent part:

Citizen Suits

(a) **Authorization; jurisdiction**

Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) **Notice**

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(d) Litigation costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not restricted

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter"

means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title, (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; or (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title).

(g) **Citizen**

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

* * * * *

Section 105(g) of the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. 1415(g), provides:

Civil suits by private persons

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any prohibition, limitation, criterion, or permit established or issued by or under this subchapter. The district courts shall have jurisdiction, without regard to the amount in

controversy or the citizenship of the parties, to enforce such prohibition, limitation, criterion, or permit, as the case may be.

(2) No action may be commenced—

(A) prior to sixty days after notice of the violation has been given to the Administrator or to the Secretary, and to any alleged violator of the prohibition, limitation, criterion, or permit; or

(B) if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States to require compliance with the prohibition, limitation, criterion, or permit; or

(C) if the Administrator has commenced action to impose a penalty pursuant to subsection (a) of this section, or if the Administrator, or the Secretary, has initiated permit revocation or suspension proceedings under subsection (f) of this section; or

(D) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of this subchapter.

(3)(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at

the request of the Administrator or Secretary, may intervene on behalf of the United States as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Administrator, the Secretary, or a State agency).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 334374 192

No. 79-1711, 79-1754, 79-1760 and 80-12

Supreme Court, U. S.
FILED
JAN 9 1981
MICHAEL RODAK, JR., CLE

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

MIDDLESEX COUNTY SEWERAGE AUTHORITY, ET AL.,
Petitioners

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.,
Respondents

JOINT MEETING OF ESSEX AND UNION COUNTIES,
Petitioner

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.,
Respondents

CITY OF NEW YORK AND ABRAHAM BEAME,
Petitioners

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.
Respondents

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Petitioners

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.,
Respondents

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CONSOLIDATED BRIEF FOR RESPONDENTS, NATIONAL SEA CLAMMERS ASSOCIATION AND GOSTA LOVGREN

Robert P. Corbin
Philip A. Ryan
Edward C. German
Dean F. Murtagh
Counsel for Respondents, National Sea Clammers Association and Gosta Lovgren

Of Counsel:
German, Gallagher & Murtagh
Suite 3100
1818 Market Street
Philadelphia, PA 19103
(215) 563-1000

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4050

QUESTIONS PRESENTED

1. Whether the Federal Water Pollution Control Act, 33 U.S.C. §1251 et seq., and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §1401, et seq., imply a private right of action independent of the rights explicitly created by the citizens suit provisions of those Acts, 33 U.S.C. §§1365(e) and 1415(g).

2. Whether a private citizen has standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution, as a general federal question under 28 U.S.C. §1331.

3. Whether any federal common law nuisance action for alleged damages sustained resulting from ocean pollution, if available to a private citizen, is not preempted by the present regulatory scheme governing ocean pollution established by the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Authorities	iv
List of Parties	1
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Statement of the Case	3
Summary of Argument	6
Argument	11
Point I	
The Citizen Suit Provisions Of The FWPCA And MPRSA Are Not The Exclusive Means Of Enforcement For Violations Of Those Acts. The Savings Clauses Of These Statutes Create Implied Causes Of Action To Which Respondents May Avail Themselves	11
Point II	
A Private Party Must Be Afforded Standing To Maintain A Federal Common Law Of Nuisance Action For Alleged Damages Resulting From Ocean Pollution As A General Federal Question Under 28 U.S.C. §1331	18
A. Analysis Of *Illinois v. City of Milwaukee* Decision	18
B. Restatement Formulation As To Standing And Damages	25
C. Relationship Between Federal Common Law Of Nuisance And Environmental Statutes and Regulations	30

TABLE OF CONTENTS—*(Continued)*

Page

Point III

Neither The FWPCA Nor The MPRSA Has Preempted Relief Available To Respondents Pursuant To The Federal Common Law Of Nuisance 32

A. Where Congress Has Chosen To Preempt, It Has Done So Expressly 32

B. Both The Statutes And Legislative History Clearly Indicate That Congress Has Expressly Preserved The Availability Of The Federal Common Law Of Nuisance And Relief Available Thereunder 33

C. Preservation Of The Federal Common Law of Nuisance Will Effectuate The Goals And Policies Of The FWPCA And MPRSA ... 34

Conclusion 36

TABLE OF AUTHORITIES

Cases: Page

Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures (SCRAP), 409 U.S. 1207, 1217-1218 (1972) 36

Ancarrow v. City of Richmond, 600 F. 2d 443 (4th Cir.) cert. denied 444 U.S. 992 (1979) 24

Banco National de Cuba v. Sabbatino, 376 U.S. 398 (1964) 8, 21

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) . 29

Burgess v. M/V Tamano, 370 F. Supp. 247 (D. Me. 1973) 27

Byram River v. Village of Port Chester, 394 F. Supp. 618 (S.D.N.Y. 1975) 24

Cannon v. University of Chicago, 441 U.S. 677 (1979) 12, 17

City of Evansville, Illinois v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979) cert. denied 100 S. Ct. 689 (1980) 24, 28

Committee for Con. of Jones Falls Sewage System v. Train, 375 F. Supp. 1148 (D. Md. 1974) *aff'd on other grounds* 539 F.2d 1006 (4th Cir. 1976) (*en banc*) 22, 23, 24

Cort v. Ash, 422 U.S. 66 (1975) . . 6, 7, 11, 12, 13, 15, 17

E. I. DaPont DeNemours & Co. v. Train, 430 U.S. 112 (1977) 10, 35

Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) 20

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) . . 7, 8, 18, 19, 20, 21, 23, 24, 25, 28, 29, 30, 32

Illinois v. Outboard Motor Corp., 619 F.2d 623, 630 (7th Cir. 1980) *petition for cert. filed* 49 U.S.L.W. 3043 (U.S. July 28, 1980) 23

TABLE OF AUTHORITIES—(*Continued*)

Page

In Re Oswego Barge Corp., 439 F. Supp. 312, 322 (N.D.N.Y. 1977) 24

Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486, 492 (2d Cir. 1968) 19

Kansas v. Colorado, 206 U.S. 46 *Missouri v. Illinois*, 200 U.S. 496 (1906) 20, 21

Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976) 10, 35

New Jersey v. New York City, 283 U.S. 473 (1931) . 20

New York v. New Jersey, 256 U.S. 296 (1921) ... 20

North Dakota v. Minnesota, 263 U.S. 365 (1923) 20

Parsell v. Shell Oil Co., 421 F. Supp. 1275 (D. Conn. 1976) *aff'd without opinion sub nom East End Yacht Club, Inc. v. Shell Oil Co.*, 573 F.2d 1289 (2d Cir. 1977) 22, 23, 24

Postal Tel. Cable Co. v. Alabama, 155 U.S. 482 (1894) 19

Reserve Mining Co. v. Environmental Protection Agency, 514 F.2d 492, 520 (8th Cir. 1975) 10, 23, 24, 35

Sierra Club v. Morton, 405 U.S. 727 (1972) 14

Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971) . 20

Textile Workers v. Lincoln Mills, 353 U.S. 448, 457 (1957) 20, 25

Touche Ross and Co. v. Redington, 442 U.S. 560 (1979) 6, 12

Township of Long Beach v. City of New York, 445 F. Supp. 1203, 1214 (D.N.J. 1978) 24

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 13 (1979) 6, 12

Page

United States v. Ira S. Bushey & Sons, 346 F. Supp. 145 (D. Vt. 1972) *aff'd* 484 F.2d 1393 (2d Cir. 1973) *cert. denied* 417 U.S. 976 (1974) 24

United States v. Solvents Recovery Service of New England, 496 F. Supp. 1127 (D. Conn. 1980) .. 24

United States v. Stoeco Homes, 498 F.2d 597 (3d Cir. 1974) *cert. denied* 420 U.S. 927 (1975) ... 24

United States, ex rel. Scott v. United States Steel Corp., 356 F. Supp. 556 (N.D. Ill. 1973) 24

Statutes: Page

N.J.S.A. 13:10-1 (1968) 5

N.Y. Environ. Con. Serv. Sec. 1-0101 (McKinney, 1973) 4

28 U.S.C. 1332(a)(1) 19

33 U.S.C. 407 (Rivers and Harbors Act of 1899) . 4

33 U.S.C. (Federal Water Pollution Control Act of 1970)
Sec. 1151-1175 19
Sec. 1160 (d)(1) 19

33 U.S.C. (Clean Water Act of 1977) (Federal Water Pollution Control Act, as amended)
Sec. 1251 ..... 3, 4, 11
1251 (a)(2) 16
1251 (b) 31
1322 (f)(1) 9, 33
1362 (5) 14
1364 (a) 7, 16
1365 (a)(b) 6, 12
1365 (e) 6, 9, 11, 13, 31, 34, 35
1365 (g) 14
1370 ..... 9, 18, 33, 35
1371 31

TABLE OF AUTHORITIES—*(Continued)*

Page

33 U.S.C. (Marine Protection, Research, and Sanctuaries Act of 1972)
Sec. 1401 . . . . . 3, 4, 11
1401 (a) 7, 16
1401 (b) 16
1412 (a) 16
1412 (c) 16
1415 (g)(5) 6, 9, 11, 34
1416 (d) 9, 18, 33

42 U.S.C. (National Environmental Policy Act of 1969)
Sec. 40321, et seq. 4

Legislative Reports:

S. Rep. No. 92-414, Reported in 1972, U.S. Code Cong. & Adm. News 3668, 3746 . . . . . 15, 31, 34

Regulations:

40 CFR Sec. 122.11(d)(2) 31

Other Authorities:

Federal Rule of Civil Procedure 12(b) 5

Friendly, "In Praise of Erie — and of the New Federal Common Law", 39 N.Y. Univ. L. Rev. 383, 408 n. 119 (1964) 22

Restatement (Second) of Torts (1979)
Sec. 821B 26, 30
821C 26, 27

LIST OF PARTIES

Petitioners in 79-1711 are Middlesex County Sewerage Authority, Bergen County Sewerage Authority, Passaic Valley Sewerage Commissioners, the Linden Roselle Sewerage Authority, and Middletown Sewerage Authority. One brief has been submitted on behalf of Middlesex County Sewerage Authority, Middletown Sewerage Authority, and Bergen County Sewerage Authority. A separate brief has been filed on behalf of Passaic Valley Sewerage Commissioners and the Linden Roselle Sewerage Authority. The petitioner in 79-1754 is the Joint Meeting of Essex and Union Counties. Petitioners in 79-1760 are the City of New York and Abraham Beame. Petitioners in 80-12 are the Environmental Protection Agency, Russell E. Train, individually and as Administrator of the United States Environmental Protection Agency, United States Army Corps of Engineers, and Martin R. Hoffman, individually and as Secretary of the United States Department of the Army. National Sea Clammers Association and Gosta Lovgren are respondents in all petitions.

The following were also parties to the proceedings below, but have not participated in the instant petitions: New York Department of Environmental Conservation, Ogden R. Reid, individually and as Commissioner of the New York Department of Environmental Conservation, New Jersey Department of Environmental Protection, David J. Bardin, individually and as Commissioner of New Jersey Department of Environmental Protection, West Long Beach Sewer District, County of West Chester, Department of Environmental Facilities, City of Long Beach, and City of Glen Cove.

OPINIONS BELOW

The opinion of the court of appeals is reported at 616 F.2d 1222, and has been reproduced in the appendix accompanying the initial petition for a writ of certiorari filed on behalf of Middlesex County Sewerage Authority, et al., No. 79-1711, at pp. 1a-36a. The judgment of the court of appeals is reproduced in the appendix to the petition for writ of certiorari of Middlesex County Sewerage Authority at pp. 37a-38a.

The opinion of the district court for the District of New Jersey is unreported officially, but appears at 12 E.R.C. 1118. The opinion and order of the district court have been reproduced in the appendix to the petition for a writ of certiorari filed on behalf of Middlesex County Sewerage Authority, et al., at pp. 40a and 60a respectively.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1980. A petition for writ of certiorari was filed on April 29, 1980 in No. 79-1711, and the petitions for certiorari in 79-1754 and 79-1760 were filed on May 5, 1980. A petition for a writ of certiorari was filed in No. 80-12 on July 3, 1980, pursuant to an extension of time granted by Mr. Justice Brennan on April 24, 1980. All petitions were granted on October 20, 1980, limited to the three questions stated herein (J.A. 48a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The two statutes principally involved herein are the Clean Water Act (Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by the Clean Water Act of 1977, Pub. L. No.

95-217, 91 Stat. 1566), 33 U.S.C. §1251, et seq., and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §1401, et seq., which have been reproduced in the appendix to the petition for a writ of certiorari filed on behalf of Middlesex County Sewerage Authority, et al., No. 79-1711 at pp. 73a-105a.

STATEMENT OF THE CASE

Respondent, National Sea Clammers Association, is an association whose members earn their livelihood through the harvesting of fish, oysters, and other shellfish from the ocean and ocean beds of the Atlantic Ocean, adjacent to the States of New York and New Jersey. Gosta Lovgren is a member of the National Sea Clammers Association, and is similarly employed. Petitioners include various federal, state, and local officials, as well as governmental departments, involved with environmental protection or sewage treatment and disposal.

On January 14, 1977, respondents, National Sea Clammers Association and Gosta Lovgren, instituted suit on their behalf and on behalf of all others similarly situated in the United States District Court for the District of New Jersey. Respondents' complaint alleges that the City of New York and various other municipalities in New York and New Jersey have in the past and continue to cause sewage, sludge, and waste materials, some of which are toxic, to be discharged into the Hudson River and into New York Harbor. (J.A. 23a). It is further alleged that this sewage and sludge which is released into the Hudson River and New York Harbor is carried into the waters of the Atlantic Ocean. It is further alleged that various municipalities and the Army Corps of Engineers have dumped and continue to dump toxic substances directly into the Atlantic Ocean. (J.A. 23a-24a). Respondents allege that some of this dumping and discharging is done pursuant to permits issued by the Army

Corps of Engineers and by the Environmental Protection Agency (J.A. 23a-24a, 30a-32a), but it is further alleged that the City of New York and the other New York and New Jersey municipalities also dump and discharge sewage, sludge, and other waste materials in a manner which does not comply with the requirements set forth in the applicable federal and state statutes or with the requirements of the permits issued by the Corps of Engineers and by the Environmental Protection Agency. (J.A. 37a).

The complaint alleges that during the summer of 1976, this dredging and discharging activity caused a massive and rapid growth of algae ranging in an area from the southwest portion of Long Island, New Jersey, to a point approximately due east of Cape May, New Jersey, and extending from a few miles offshore to more than twenty miles out to sea. (J.A. 25a). When this massive algal bloom died, its residuals settled on the ocean floor, creating a condition of anoxia, or oxygen deficiency, in and about the water near the ocean's floor. This condition resulted in the death and destruction of an enormous amount of marine life, particularly with respect to the shellfish and other ocean-bottom dwellers and other marine life unable to escape the blighted area. Since July is the normal spawning season for clams and other shellfish, the impact of this condition on future stocks of shellfish was extremely severe. As a result, the commercial fishing, clamming, and related industries, in which respondents earned their livelihood, were virtually destroyed.

In their complaint, respondents alleged violations of the National Environmental Policy Act of 1969, 42 U.S.C. §40321, et seq., the Federal Water Pollution Control Act, 33 U.S.C. §1251, et seq., the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §1401, et seq., the Rivers and Harbors Act of 1899, 33 U.S.C. §407, the New York Environmental Conservation Law, N.Y. Environ. Con. Serv. §1-0101 (McKinney

1973), the New Jersey Conservation and Development Law, N.J.S.A. 13:10-1 (1968), the federal common law of nuisance, and the Fifth, Ninth, and Fourteenth Amendments to the Constitution. The complaint seeks injunctive relief, damages, mandamus to compel compliance with statutory duties, the imposition of fines and penalties for certain of the violations alleged, the award to respondents of one-half of the fines assessed, and the reasonable expenses of litigation, including expert witness and attorneys' fees.

Petitioners moved to dismiss all claims pursuant to Rule 12(b), Federal Rules of Civil Procedure. Treating these motions as motions for summary judgment, the district court granted said motions as to each cause of action alleged. The district court dismissed the complaint, with prejudice, as to all claims except for two which arose under state law, which were dismissed without prejudice.

On appeal, the Third Circuit Court of Appeals reversed the judgment of the district court to the extent that the district court judgment dismissed respondents' claims under the Federal Water Pollution Control Act, the Marine Protection, Research, and Sanctuaries Act, and respondents' common law nuisance and maritime tort claims. The Third Circuit affirmed the district court's dismissal of respondents' Refuse Act claim, Federal Tort Claims Act, and state tort claims, and the Constitutional claims. With respect to the district court's dismissal of the National Environmental Policy Act claim, the Third Circuit vacated the district court's order with direction that this claim be remanded for consideration of the record developed on remand.

SUMMARY OF ARGUMENT

I.

The question of whether a private right of action should be implied under a federal statute is essentially a matter of statutory construction. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979). In such an analysis, the ". . . central inquiry remains whether Congress intended to create . . . a private cause of action." *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979). This Court has identified four factors which are relevant in determining legislative intent. *Cort v. Ash*, 442 U.S. 66 (1975).

Both the FWPCA and MPRSA contain special citizen suit provisions which enable private citizens to sue, subject to certain restrictions, to enforce the statutes. See 33 U.S.C. § 1365(a) and (b); 33 U.S.C. § 1415(g)(1) and (2). In addition, however, each statute also contains a savings clause specifically preserving rights and remedies available under any statute or common law. 33 U.S.C. § 1365(e); 33 U.S.C. § 1415(g)(5). The savings clauses provide for relief on two different bases. First, each statutory section unambiguously preserves existing rights and remedies available under any statute or common law. However, each statute also provides, in clear and unambiguous language, that the basic citizen suit provision does not constitute the exclusive means for enforcement for a violation of the statute. For example, the savings clause in the FWPCA provides that the rights of any person or class of persons " . . . to seek enforcement of any effluent standard or limitation . . . " is in no way restricted by any of the other provisions of the statutory section. Since any such effluent standard or limitation would be promulgated pursuant to the FWPCA, it is obvious that this specific language in the savings clause was intended to provide an implied remedy for actually injured persons, such as the respondents herein, for violations of the Act.

An analysis of the other *Cort* factors also clearly indicates the existence of an implied cause of action under both statutes. Both statutes, while providing relief which would benefit the public at large, are clearly intended to especially benefit those who earn their livelihood by fishing and harvesting the ocean's marine life. Moreover, implying such a cause of action under each statute would certainly be helpful to the accomplishment of the statutory purposes, which include the preservation and fostering of " . . . economic potentialities . . . " with respect to those industries dependent upon the ocean and marine life. See 33 U.S.C. § 1401(a). See also 33 U.S.C. § 1364(a). Finally, there can be no doubt but that water pollution of the Atlantic Ocean is an interstate problem as to which federal, rather than state, interests must predominate.

II.

In *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), this Court gave explicit recognition to the existence of a cause of action for federal common law nuisance. The plaintiff in that case was a state seeking to invoke the original jurisdiction of this Court in order to enjoin a public nuisance originating outside of that state. The Court spoke of several factors which justified the creation of common law rights in that case. For our purposes, the most pertinent factor discussed in the *City of Milwaukee* decision was the involvement of an interstate waterway. In this regard, the Court observed: "Our decisions concerning interstate waters contain the same theme. Rights in interstate streams, like questions of boundaries, 'have been recognized as presenting federal questions.' " 406 U.S. at 105. This Court further explained that the presence of a state as a party was not a necessary precondition for the application of the federal common law of nuisance: "Thus, it is not only the character of the parties that requires us to apply federal law.

(Citations omitted) As Mr. Justice Harlan indicated for the Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 'Where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law.' " 406 U.S. at 105, n. 6.

In the present case, petitioners in 79-1711, 79-1754, and 79-1760 have argued that the key element in the application of the federal common law of nuisance in the *Illinois v. City of Milwaukee* decision was the presence of a state as a party. This, however, is an overly restrictive reading of that decision. Where, as here, the alleged nuisance affects an interstate body of water, and where there is an interstate element in the cause and effect of the nuisance, there is no reason that a private party should be barred from seeking relief under the federal common law. The interstate, navigable waterway which is involved here is the Atlantic Ocean; the pollution which is the subject of this suit originated both in New York and in New Jersey; and the interests which are sought to be protected affect the entire New Jersey coastal region. Thus, the instant case is distinguishable from many of the decisions cited and relied upon by petitioners in which the nuisance had only intrastate effects on the navigable waterways of the United States.

It is respectfully submitted that this Court should endorse the formulation contained in the Restatement of Torts as the appropriate rule in suits alleging a cause of action under the federal common law of nuisance. The Restatement formulation should be applied to determine whether in fact there is a public nuisance, and whether the plaintiff has standing to recover damages for this alleged public nuisance. If the Restatement formulation were to be applied to the present case, it is quite clear that respondents would satisfy the requirement that their loss be different in kind from that suffered by the general public. Indeed, the present case is virtually in-

distinguishable from Illustration 11 under Section 821C of the Restatement (Second) of Torts, which states, "A pollutes public waters, killing all of the fish. B, who has been operating a commercial fishery in these waters, suffers pecuniary loss as a result. B can recover for the public nuisance."

Finally, as demonstrated in Section III, it is clear that Congress expressly preserved common law rights in order to supplement the statutory scheme. Although courts can be expected to give considerable weight to statutory compliance in determining whether an activity is a public nuisance, it is apparent from the language and legislative history of the Federal Water Pollution Control Act that statutory compliance would not necessarily except a discharger from common law liability. Unless and until there is complete preemption of the environmental field by Congress, a federal common law will continue to be a necessary and effective supplement to the statutory and regulatory scheme.

III.

Neither the FWPCA nor the MPRSA has preempted any relief available pursuant to the federal common law of nuisance. Each statute contains a savings clause which specifically preserves all rights and remedies available " . . . under any statute or common law . . . " 33 U.S.C. § 1365(e); 33 U.S.C. § 1415(g)(5). Moreover, the legislative history of these Acts plainly indicates that the availability of a common law action for damages was not intended to be preempted by the statutes. Finally, the statutes themselves indicate that where Congress chose to preempt, it did so expressly in the statutes. See, e.g. 33 U.S.C. §§ 1322(f)(1) and 1370; 33 U.S.C. § 1416(d).

Moreover, the preservation of the federal common law of nuisance will effectuate the goals and policies of

the statutes. Each of the federal statutes anticipate, and indeed encourage, a certain degree of conflict with respect to the effluent or other standards which a discharger must satisfy. Thus, the mere fact of a potential conflict between such a limitation and a possible common law action is an insufficient basis to preempt the common law of nuisance. Equally importantly, the EPA has argued for the continued existence of the federal common law of nuisance, e.g. *Reserve Mining Co. v. EPA*, 514 F.2d 492 (8th Cir. 1975), and its views are entitled to great weight. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976); *E.I. DuPont DeNemours & Co. v. Train*, 430 U.S. 112 (1977). In applying the federal common law of nuisance, federal courts are fully equipped to tailor the relief necessary consistent with the equities of any particular case.

ARGUMENT

POINT I

The Citizens Suit Provisions of the FWPCA and MPRSA Are Not the Exclusive Means of Enforcement for Violations of Those Acts. The Savings Clauses of these Statutes Create Implied Causes of Action to Which Respondents May Avail Themselves.

In their Complaint, respondents alleged violations of the FWPCA, 33 U.S.C. § 1251 et seq. and the MPRSA, 33 U.S.C. § 1401 et seq. The district court dismissed respondents' claims under these two statutes, holding that the respondents' failure to give notice purportedly required by the citizens suit provisions contained in these Acts deprived the court of jurisdiction. The court of appeals reversed the holding of the district court, finding that the citizens suit provisions of the two statutes were not the exclusive means of enforcement for violations of the statutes. The court below held that there exists an implied cause of action available to respondents pursuant to the "savings clauses" contained in the statutes. See, 33 U.S.C. § 1365(e) (FWPCA); 33 U.S.C. § 1415(g)(5) (MPRSA).

In *Cort v. Ash*, 422 U.S. 66 (1975), this Court established a four part test to determine whether a private remedy is implicit in a statute not expressly providing one. The factors are:

> First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted,' . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit, or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . .

> And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? 422 U.S. at 78.

Subsequent decisions of this Court have further refined the mode of analysis to be applied in determining whether a private right of action is to be implied under a federal statute. In *Touche Ross and Co. v. Redington*, 442 U.S. 560 (1979), this Court held that the *Cort* factors are merely relevant to the inquiry of whether a private remedy is implied. Noting that the *Cort* factors are not entitled to equal weight, this Court stated:

> The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action.

More recently, the Court has held that the issue "[W]hether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 13 (1979).

An analysis of the issue of whether a federal statute creates an implied cause of action must begin with the language of the statute itself. *Transamerica Mortgage Advisors, Inc. v. Lewis, supra.; Touche Ross and Co. v. Redington, supra.; Cannon v. University of Chicago*, 441 U.S. 677 (1979). Both the FWPCA and MPRSA contain citizens' suit provisions authorizing private citizens to sue to enforce the Act subject to certain statutory restrictions. See, 33 U.S.C. §1365 (a) and (b) (FWPCA); 33 U.S.C. §1415 (g)(1) and (2) (MPRSA). Each of these statutes, however, also contains a "savings clause". The "savings clause" in the FWPCA is typical and provides:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforce-

> ment of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

The court of appeals held that the citizens' suit provisions of the federal statutes in question created an implied cause of action in favor of persons, such as respondents herein, who have alleged actual economic harm as a result of violations of the respective statutes. Respondents submit that the language and legislative history of the statutes, as well as the analysis pursuant to the *Cort* factors, compels the conclusion that there exist implied causes of action under both the FWPCA and MPRSA.

Careful analysis of the "savings clauses" reveals that the phrase is, in certain important respects, a misnomer. To be sure, each "savings clause" specifically preserves existing rights ". . . under any statute or common law . . . to seek any other relief . . .". In addition, however, each clause creates new federal rights, available to respondents herein, and not subject to the notice or other requirements contained in the citizens suit provisions. The language of the savings clause indicates that, in addition, the citizens suit provision is *not* the exclusive means for enforcement for a violation of ". . . any effluent standard or limitation" contained in that Act. The language "to seek enforcement of any effluent standard or limitation" contained in 33 U.S.C. §1365(e) is clearly intended to constitute the Congressional declaration that the right of economically injured persons, such as respondents herein, to sue for enforcement of violations of the FWPCA is not limited as is the right of non-economically injured persons, to the basic citizen suit provisions.

The court of appeals analysis as to the independent significance of 33 U.S.C. §1365(e) for injured as opposed to non-injured parties is further supported by the fact that the basic citizen suit provision of the FWPCA limits relief to a "citizen," whereas the "savings clause" of that statute provides relief for "any person." A "citi-

zen" is defined, rather restrictively, in the statute as a "person or persons having an interest which is or may be adversely affected." 33 U.S.C. §1365(g). The selection of the statutory language, of course, was a Congressional effort to comply with this Court's then recent decision in *Sierra Club v. Morton*, 405 U.S. 727 (1972). No such restriction, however, is found in the statute's definition of person[1]. The Congressional selection of the definitions of "citizen" and "person" in the statute clearly indicates the intent to provide differing rights and remedies to different groups. The basic citizen suit provision was designed to afford certain remedies to non-injured members of the public who could satisfy the statutory requirements as to who constitutes a "citizen." Interference with such party's aesthetic, conservational, or recreational rights could certainly constitute an "adverse affect" within the meaning of the FWPCA. For such a party, the right to monetary damages ordinarily could not be shown, so that the specific and limited remedies available under the citizen suit provisions would clearly make that individual or entity whole. This, of course, would not be true with respect to an individual or a group of individuals who have suffered actual, economic injury as a result of a violation of FWPCA. Thus, the specific language of the "savings clause" of the statute makes it clear that while the rights and remedies of such a person under any statute or common law is in no way restricted by the basic citizen suit provisions and limitations, such an actually injured person is also entitled to maintain a suit for violation of "any effluent standard or limitation" under the Act pursuant to the "savings clause", where actual injury and damages can be shown.

---

1. 33 U.S.C. §1362(5) defines the term "person" to mean "an individual, corporation, partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body."

Respondents also submit that there is nothing in the legislative history to the contrary. Indeed, the petitioners' sole argument to the effect that there is a contrary legislative intent is the reference, in the legislative history, to the fact that the savings clause preserves rights "under any *other* law." See, S. Rep. No. 92-414, reported in 1972, U.S. Code Cong. & Adm. News 3668, 3746. The court of appeals was ". . . not persuaded that this paraphrase of the wording of the Act was intended to preclude the finding of a private remedy under the Act." (App. 16a.) Petitioners suggest that the statutory language "any statute" is really meant to refer to "any other statute," i.e., any statute other than FWPCA itself. Petitioners' argument, however, fails to note the two-fold purpose served by the savings clause.

The legislative reference to "any other statute" is clearly intended to refer to the fact that rights and remedies under any statute or common law are, indeed, specifically preserved by the savings clause. This legislative reference, however, in no way negates the clear statutory mandate, also contained in the savings clause, that rights "under any statute . . . to seek enforcement of any effluent standard or limitation . . ." are preserved.

An analysis of the remaining *Cort* factors also clearly indicates the existence of an implied cause of action under the FWPCA and MPRSA. The first *Cort* factor was whether the plaintiff was "one of the class for whose *especial* benefit the statute was enacted, . . . that is, does the statute create a federal right in favor of the plaintiff?" As the court of appeals below correctly held, while the two Acts specifically grant remedies to non-injured persons suing on behalf of the public, it is clear that the "class for whose *especial* benefit the statute was enacted" must have been individuals who have suffered actual injury by the pollution. Plaintiffs are members of a class that earns its livelihood from the sea and are therefore especially damaged by ocean pollution. The general purpose clause of the FWPCA contains a provi-

sion that the national goal shall include the attainment of that "water quality which provides for the protection and propagation of the fish, shellfish, and wildlife." 33 U.S.C. §1251(a)(2). The FWPCA recognizes the potential economic disasters which may result from unabated pollution and for this reason, has granted certain emergency powers to the Administrator. Thus §504 of the Act provides:

> Notwithstanding any other provision of this chapter, the Administrator upon receipt of evidence that a pollution source, or combination of sources is presenting an imminent and substantial endangerment to the health of persons *or to the welfare of persons where such endangerment is to the livelihood of such persons, such as an inability to market shellfish,* may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person causing or contributing to the alleged pollution to stop the discharge of pollutants causing or contributing to such pollution or to take such other action as may be necessary. 33 U.S.C. §1364(a). (Emphasis supplied.)

It is equally clear that the respondents are, with respect to the MPRSA, the "class for whose *especial* benefit the statute was enacted." Included in the MPRSA is a statutory Congressional finding that "[U]nregulated dumping of material into ocean waters endangers . . . economic potentialities" and accordingly, it is the policy of the United States" . . . to regulate the dumping of all types of materials into ocean water to prevent or strictly limit the dumping into ocean waters of any material which would adversely affect . . . economic potentialities." 33 U.S.C. §1401(a) and (b). Moreover, in reviewing and evaluating applications for dumping permits pursuant to MPRSA, the Administrator is specifically required to consider, among other things, "the effect of such dumping on fisheries resources, plankton, fish, shellfish, wildlife, shore lines and beaches." 33 U.S.C. §1412(a)(C).

The implication of a private right of action is also "consistent with the underlying purposes of the legislative scheme," and therefore, the *Cort* factor is also satisfied. This factor has been expanded by this Court in *Cannon v. University of Chicago, supra*, wherein this Court noted:

> when [a private right of action] is necessary or at least helpful to the accomplishment of the purpose, the court is decidedly receptive to its implication under the statute. 441 U.S. at 703.

As the court below noted, there can be no doubt that implying a private remedy on behalf of the respondents would certainly be "helpful" towards the effectuation of the purposes of both the FWPCA and MPRSA (App. 17a.) Moreover, the implication of a private remedy under the statutes would be entirely consistent with the general purposes of the Acts as well as the particular purposes in each Act of protecting and encouraging the propagation of marine life.

The fourth element in the *Cort* analysis also indicates Congress' intent to permit a private cause of action pursuant to the savings clauses in the statutes. As the court below aptly noted:

> Far from being an area of traditional state concern, water pollution of the Atlantic Ocean is an interstate phenomenon of federal concern as to which an implied private remedy in the federal courts should not be denied. (App. 17a.)

Moreover, the statutes themselves indicate the extent to which federal rather than state or local concerns must predominate. For example, the FWPCA has preempted the right of any state or political subdivision thereof or interstate agency from adopting or enforcing any effluent standard, prohibition, pretreatment standard or standard of performance which is less stringent than the effluent limitation, standard, or prohibition enacted pur-

suant to the Act. 33 U.S.C. §1370. Similarly, the MPRSA has prohibited any state from "adopt[ing] or enforce[ing] any rule or regulation relating to any activity regulated by this subchapter." 33 U.S.C. §1416(d). The statutes, therefore, clearly evidence the overriding federal concern in the areas regulated by the statutes.

POINT II

A Private Party Must Be Afforded Standing to Maintain a Federal Common Law of Nuisance Action for Alleged Damages Resulting From Ocean Pollution As a General Federal Question Under 28 U.S.C. §1331.

A. Analysis of *Illinois v. City of Milwaukee* Decision

As a result of this Court's landmark decision in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), a new and potentially effective remedy was made available to parties seeking relief in water pollution cases in the federal courts under the federal common law of nuisance. In that case, the Court found that Illinois could sue under federal common law to enjoin a public nuisance originating outside the state, but which was polluting property within Illinois. Illinois had moved to file a bill of complaint in the Supreme Court, alleging a federal common law right of action against four Wisconsin cities, among others, to abate pollution of Lake Michigan, a navigable interstate waterway. The Court found that the controversy was cognizable under its original jurisdiction since the plaintiff was a state. The Court noted, however, that its jurisdiction was non-exclusive, and therefore, exercise of original jurisdiction was discretionary.[2] The Court felt that it was ill-equipped as a fact finder in such disputes, and thus denied the motion for leave to file an original complaint.

---

2. "We construe 28 U.S.C. §1251(a)(1) . . . to honor our original jurisdiction but to make it obligatory only in appropriate cases." 406 U.S. at 93.

The Court in *City of Milwaukee* then addressed the question of whether a federal forum was available to the plaintiff state. Federal jurisdiction could not be based on diversity of citizenship because a state is not considered a citizen of itself for purposes of diversity jurisdiction.[3] Federal jurisdiction, therefore, depended upon the existence of federal question, and the Court held that federal common law could be an independent basis for federal question jurisdiction in the federal courts. In support of this holding the Court stated: "The rationale of the 1875 grant of federal question jurisdiction — to ensure the availability of a forum designed to minimize the danger of hostility toward, and specially suited to the vindication of, federally-created rights — is as applicable to judicially-created rights as to rights created by statute." 406 U.S. at 100 (quoting *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, 492 (2d Cir. 1968)).

The *City of Milwaukee* Court spoke of three different factors which justified the creation of common law rights in that case. It is apparent from the Court's discussion of these factors, and the citation of cases concerning each, that all three factors need not be present in a given case in order for federal common law to be recognized. To the contrary, in any given case the presence of any one of these factors would justify the recognition of federal common law.

In *City of Milwaukee*, the Court first spoke of situations where federal common law had been implied from the substance of federal statutes. Illinois had alleged a federal common law right of action despite the availability of a remedy under the Federal Water Pollution Control Act.[4] However, the remedy authorized by that statute was a long conference procedure leading ultimately to amicable settlement.[5] The Court found that injunc-

---

3. 28 U.S.C. §1332(a)(1). *See, Postal Tel. Cable Co. v. Alabama*, 155 U.S. 482 (1894).

4. 33 U.S.C. §§1151-1175 (1970) (amended 1972).

5. 33 U.S.C. §1160(d)(1) (1970) (amended 1972).

tive relief would be consistent with the policy of the statute, which provided that, "[s]tate and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not . . . be displaced by federal enforcement action." 406 U.S. at 104. The Court went on to observe: "The remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress. Yet the remedies which Congress provides are not necessarily the only federal remedies available. 'It is not uncommon for federal courts to fashion federal law where federal rights are concerned.' " 406 U.S. at 103 (quoting *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457 (1957)). In short, in light of the various federal environmental protection statutes which created causes of action in federal court to abate pollution of navigable waters, the implication of a remedy would further the federal interest by providing a uniform rule of decision in disputes over those waterways.

The Court next referred to situations where federal common law had been applied in suits between states or between a state and citizens of another state. Neither the constitution nor any statutes provided a rule of decision in such disputes, and the Court of necessity developed a federal common law to avoid the unsuitability of looking to the law of a particular state when two states were in dispute. Several examples of this application of federal common law as a rule of decision were cited by the Court in the *City of Milwaukee* opinion.[6] The Court

6. E.g., *New York v. New Jersey*, 256 U.S. 296 (1921) (state can be enjoined from dumping material into harbor that polluted waters of neighboring state); *New Jersey v. New York City*, 283 U.S. 473 (1931) (state can be enjoined from polluting coastal waters of another state); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (state enjoined from utilizing method of water drainage that adversely affected neighboring state); *Missouri v. Illinois*, 200 U.S. 496 (1906) (state has right to enjoin neighboring states' sanitation district from polluting water that flowed into plaintiff state); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (private business enjoined from discharging noxious fumes that polluted air of neighboring state). See also, *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971) (private business enjoined from dumping chemicals that polluted coastal waters of neighboring state).

quoted with approval from *Kansas v. Colorado*, 206 U.S. 46, in which it was observed that "Through these successive disputes and decisions this Court is practically building up what may not improperly be called interstate common law." 406 U.S. at 105-106.

Finally, the Court stated that the application of federal common law was appropriate because of the involvement of an interstate waterway. In this regard, the Court observed: "Our decisions concerning interstate waters contain the same theme. Rights in interstate streams, like questions of boundaries, 'have been recognized as presenting federal questions.' " 406 U.S. at 105. The Court then went on to state in a footnote which has been the focus of much attention in the present suit: "Thus, it is not only the character of the parties that requires us to apply federal law. (citations omitted) As Mr. Justice Harlan indicated for the Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 'Where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law." 406 U.S. at 105, n.6.

Petitioners in 79-1711, 79-1754, and 79-1760 have proposed a narrow interpretation of this Court's decision in *Illinois v. City of Milwaukee*, and have attempted to restrict its holding to its particular facts. In their view, the key element in the application of the federal common law of nuisance was the presence of a state as a party. But as we have just seen, other factors were present which militated in favor of the application of the federal common law. It is respectfully submitted that this attempt to narrow the scope of this Court's holding in *Illinois v. City of Milwaukee* should be rejected. Where, as here, the nuisance affects an interstate body of water, and where there is an interstate element in the cause and effect of the nuisance, there is no reason that a private party should be barred from seeking relief under the federal common law. The need for the applica-

tion of a federal rule of decision is abundantly clear in the present case. The interstate, navigable waterway which is involved here is the Atlantic Ocean; the pollution which is the subject of this suit originated both in New York and in New Jersey; and the interests which are sought to be protected affect the entire New Jersey coastal region. The court of appeals below quite correctly observed that, "Relegating these litigants to possibly conflicting New York and New Jersey nuisance standards would ignore the clear intent of the Supreme Court to federalize those standards and would undermine that federal uniformity. These plaintiffs have sufficiently alleged pollution of interstate waters. In order to give full effect to the federal common law of nuisance recognized in *Illinois*, private parties should be permitted, and indeed encouraged, to participate in the abatement of such nuisances." (App. 25a-26a.)[7]

It is important to note that the instant suit does not involve a nuisance which has only intrastate effects on a navigable waterway of the United States. Thus, many of the decisions cited and relied upon by petitioners have no application here. In *Parsell v. Shell Oil Co.*, 421 F. Supp. 1275 (D. Conn. 1976), aff'd without opinion sub nom. *East End Yacht Club, Inc. v. Shell Oil Co.*, 573 F.2d 1289 (2d Cir. 1977), the court stated that, "No interstate effect is alleged in the complaint. The impact of the spill appears to be limited to Bridgeport Harbor." 421 F. Supp. at 1281. Similarly, in *Committee for Con. of Jones Falls Sewage System v. Train*, 375 F. Supp 1148 (D. Md. 1974), affirmed on other grounds, 539 F.2d 1006 (4th Cir. 1976) (en banc), the alleged pollution did not in-

---

7. Application of the federal common law of nuisance should not depend upon the existence of an actual conflict between the laws of two or more states. Rather, federal law should apply because "the interstate nature of [the] controversy makes it inappropriate that the law of either state should govern." Friendly, *In Praise of Erie — and of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383, 408 n. 119 (1964).

volve any interstate effects. Indeed, the majority opinion noted:

> In controversies such as this one, there is present neither the reason nor the necessity for the invocation of a body of federal common law which was present in *Illinois v. Milwaukee*. This intrastate controversy is entirely local. The plaintiffs are Maryland citizens complaining of the conduct of public officials of the City and County of Baltimore, Maryland. 539 F.2d at 1009.

The majority opinion further stated that, "It is not contended that the alleged pollution of Jones Falls stream has any effect outside the State of Maryland, and no other state is complaining of it." *Id.* Thus, dismissal of the claims based on the federal common law of nuisance in the *Parsell* and *Jones Falls* cases was appropriate because of the absence of an interstate effect on the conduct in question. See, *Reserve Mining Co. v. Environmental Protection Agency*, 514 F.2d 492, 520 (8th Cir. 1975). When a nuisance has only intrastate effects on a navigable waterway of the United States, a nuisance action under state law may be sufficient to vindicate the rights of a private party. This, however, is clearly not the situation in the case at hand.[8]

---

8. Because of the important federal interest in the waters of the Atlantic Ocean and because of the interstate nature of the pollution in question in this suit, it is not necessary to decide whether an interstate effect is a necessary condition for the application of the federal common law of nuisance. We note, however, that conflicting views on this issue have been expressed by the lower courts. See, *Illinois v. Outboard Marine Corp.*, 619 F.2d 623, 630 (7th Cir. 1980), petition for cert. filed, 49 U.S.L.W. 3043 (U.S. July 28, 1980), where Judge Wisdom, sitting by designation, stated:

> We conclude, based on *Illinois v. Milwaukee* and the Federal Water Pollution Control act, that there is an overriding federal interest in preserving, free of pollution, our interstate and navigable waters. When a pollution controversy arises, it is immaterial whether there is a showing of extraterritorial pollution ef-

It should further be noted that many courts have recognized that the *City of Milwaukee* decision should not be restricted to its particular facts. Both the Second and Third Circuits have held that the United States can state a claim for relief under the federal common law. *United States v. Ira S. Bushey & Sons,* 346 F. Supp. 145 (D. Vt. 1972), aff'd 484 F.2d 1393 (2nd Cir. 1973), cert. denied, 417 U.S. 976 (1974); *United States v. Stoeco Homes,* 498 F.2d 597 (3d Cir. 1974), cert. denied, 420 U.S. 927 (1975). Similarly, in *Township of Long Beach v. City of New York,* 445 F. Supp. 1203, 1214 (D.N.J. 1978), the court held that a municipality is entitled to bring an action based on the federal common law of nuisance. In *City of Evansville, Indiana v. Kentucky Liquid Recycling, Inc.,* 604 F.2d 1008 (7th Cir. 1979), cert. denied, 100 S. Ct. 689 (1980), the plaintiffs were municipal corporations who were required to spend public funds because of the pollution of an interstate waterway by acts done in another state. Standing to sue under the federal common law of nuisance was granted to those plaintiffs. Finally, in *Byram River v. Village of Port Chester,* 394 F. Supp. 618 (S.D.N.Y. 1975), the court extended standing to a private corporation (Byram River

---

NOTE 8 — *(Continued)*

fects. The issue is whether the dispute is a matter of federal concern. When it is, as in this case, federal courts should be accessible.

See also, *United States v. Solvents Recovery Service of New England,* 496 F. Supp. 1127 (D. Conn. 1980), *In Re Oswego Barge Corp.,* 439 F. Supp. 312, 322 (N.D.N.Y. 1977) (denying crossmotion to dismiss federal common law claim for pollution of navigable waterway affecting only one state); *United States, ex rel. Scott v. United States Steel Corp.,* 356 F. Supp. 556 (N.D. Ill. 1973) (denying motion to dismiss claim for federal common law of nuisance for intrastate pollution of Lake Michigan). But see, *Ancarrow v. City of Richmond,* 600 F.2d 443 (4th Cir.), cert. denied, 444 U.S. 992 (1979); *Committee for Con. of Jones Falls Sewage System v. Train, supra; Reserve Mining Co. v. EPA, supra; Parsell v. Shell Oil Co., supra.*

Pollution Abatement Association), a municipal corporation (the Town of Greenwich), and a private individual who owned land on the river's bank.

In summary, the holding of the court of appeals below concerning the standing of private parties to sue under the federal common law of nuisance is consistent with the rationale of this Court's decision in *Illinois v. City of Milwaukee*. The time has now come to make explicit that which was implicit in the Court's decision. Although *Illinois v. City of Milwaukee* did not itself authorize suits by private parties under the federal common law of nuisance (because that issue was not then before the Court), an extension of the Court's rationale to private parties is now proper.

B. Restatement Formulation As to Standing and Damages

With regard to the formulation or source of a federal rule to govern actions sounding in the federal common law of nuisance, the court of appeals below stated, "While *Illinois v. City of Milwaukee* did not address this specific issue, we are convinced that the Court would apply the mode of analysis of *Lincoln Mills* and would look to the Restatement formulation as an appropriate source for a federal rule." (App. p. 27a).

It is respectfully submitted that the Court should accept this invitation from the court of appeals, and should endorse the Restatement formulation as the appropriate rule in suits alleging a cause of action under the federal common law of nuisance. We have already demonstrated in the preceding section that no valid reason exists for limiting standing to states or governmental entities. We have also noted above that no cause of action under the federal common law of nuisance should be recognized unless an interstate, navigable waterway of the United States is involved. If this interstate ele-

ment is satisfied, then the Restatement formulation should be applied to determine whether in fact there is a public nuisance, and whether the plaintiff has standing to recover damages for this alleged public nuisance.

> The Restatement defines public nuisance as follows:
> (1) A public nuisance is an unreasonable interference with a right common to the general public.
> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort, or the public convenience, or;
> (b) whether the conduct is proscribed by a statute, ordinance, or administrative regulation, or;
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Restatement (Second) of Torts, §821B (1979).

The Restatement then goes on to define who may recover damages as a result of a public nuisance. Section 821C of the Restatement provides, "In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of the interference." In the official comments to Section 821C, the authors of the Restatement make it clear that pecuniary loss to a plaintiff normally satisfies the requirement that the plaintiff's loss must be different in kind from that suffered by the general public in order to maintain an action for the public nuisance. Indeed, the

present case is virtually indistinguishable from Illustration 11 under Section 821C. Illustration 11 states, "A, pollutes public waters, killing all of the fish. B, who has been operating a commercial fishery in these water, suffers pecuniary loss as a result. B, can recover for the public nuisance."

The case of *Burgess v. M/V Tamano*, 370 F. Supp. 247 (D. Me. 1973), is also directly on point here. Although the court in *Tamano* did not discuss the federal common law of nuisance, the court was guided by general nuisance standards. In *Tamano* a group of commercial fishermen and commercial clam diggers sought damages as a result of a discharge in the waters of Casco Bay of approximately 100,000 gallons of oil from the tanker M/V Tamano. Defendants filed a motion to dismiss on the grounds that these plaintiffs did not have a legally cognizable interest in the coastal waters and marine life or shores which were claimed to have been injured by the spill. In denying these motions to dismiss as to the commercial fishermen and clam diggers, the court observed:

> The commercial fishermen and clam diggers in the present cases clearly have a special interest, quite apart from that of the public generally, to take fish and harvest clams from the coastal waters of the State of Maine. The injury of which they complain has resulted from defendants' alleged interference with *their* direct exercise of the public right to fish and to dig clams. It would be an incongruous result for the Court to say that a man engaged in commercial fishing or clamming, and dependent thereon for his livelihood, who may have had his business destroyed by the tortious act of another, should be denied any right to recover for his pecuniary loss on the ground that his injury is no different in kind from that sustained by the general public. Indeed, in substantially all of those cases in which commercial fishermen using public waters have sought

> damages for the pollution or other tortious invasion of those waters, they have been permitted to recover. (Citations omitted) . . . In the view of this Court, to the extent their pecuniary losses can be established, the commercial fishermen and clam diggers should be entitled to recover for the same.

370 F. Supp. at 250.

Additional support for respondents' position regarding the award of damages in suits under the federal common law of nuisance is found in the Seventh Circuit's opinion in *City of Evansville, Indiana v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979), cert. denied, 100 S. Ct. 689 (1980). In the *City of Evansville* case the Seventh Circuit rejected defendants' contention that the request by plaintiffs for damages rather than injunctive relief precluded the exercise of jurisdiction by the district court. The Seventh Circuit observed:

> We have held that plaintiffs are appropriate parties to maintain the cause of action asserted. The question of what relief, if any, they may be entitled to is independent of the Court's power to hear and decide the merits of the claim. Whether or not defendants have breached any obligations for which they should be held liable to plaintiffs will be determined by judge-made rules. The consequences of any breach of duty imposed by the courts are necessarily also determined by the courts. The remedies appropriate for the violation of duties imposed under the federal common law of water pollution will necessarily depend upon the facts in a particular case. We hold only that a request for damages does not preclude the exercise of jurisdiction of a claim arising under the federal common law of interstate water pollution. 604 F.2d at 1019. (Citations omitted).

As in the present case, defendants in the *City of Evansville* case apparently took the position that *Illinois v. City of Milwaukee* should be read narrowly, and relief in all

future cases arising under the federal common law of nuisance should be restricted to the relief involved in the City of Milwaukee case. The Seventh Circuit rejected this narrow reading of *Illinois v. City of Milwaukee*, reasoning:

> The sewer district seems to assert that the Supreme Court's decision in *Illinois v. Milwaukee* establishes a request for equitable relief as a "criterion" for maintaining a claim under the federal common law of interstate water pollution. We disagree. Plaintiffs in that case sought equitable relief because of the nature of the claimed injury. The Supreme Court's discussion of Illinois' right to maintain the action, therefore, focused on that type of claim. We find nothing in the opinion that supports the conclusion that equitable relief is exclusive or that a request for such relief is essential.

604 F.2d at 1019.

Finally, it is important to recall this Court's decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), where this Court held that a violation of the Fourth Amendment by a federal agent acting under color of federal authority gave rise to a federal cause of action for damages as a result of the agent's unconstitutional conduct. In reaching that decision, this Court stated:

> That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by the federal officials should hardly seem a surprising proposition . . . Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But "it is . . .well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong." *Bell v. Hood*, 327 U.S. at 684.

403 U.S. at 395-96.

In summary, the holding of the court of appeals concerning the availability of monetary damages to respondents was correct, and should be affirmed by this Court.

C. Relationship Between Federal Common Law of Nuisance and Environmental Statutes and Regulations

The non-federal petitioners have asserted that, "Because of its ad hoc nature the common law nuisance action does not contribute functionally to a sound system for control and regulation of environmental pollution and . . . conprehensive, legislative, and administrative regulation is better suited to that end." (Brief for Petitioners, Middlesex County Sewerage Authority, et al., at 9.) Petitioners further contend that it would be "oppressive" to impose the "unwritten standards of the federal common law of nuisance" on them in addition to the federal and state regulations with which they are already required to comply. (Brief for Petitioners, Passaic Valley Sewerage Commissioners, et al., at 16.)

In response to these contentions it should first be observed that there is little likelihood that courts will summarily reject whatever guidance may be afforded by the environmental statutes or regulations. Indeed, in *Illinois v. City of Milwaukee*, this Court remarked, "While the various federal environmental protection statutes will not necessarily mark the outer bounds of the federal common law, they may provide useful guidelines in fashioning such rules of decision." 406 U.S. at 103, n. 5. In addition, the comments to Section 821B of the Restatement (Second) of Torts state, "If there has been established a comprehensive set of legislative acts or administrative regulations governing the details of a particular kind of conduct, courts are slow to declare an activity to be a public nuisance if it complies with the regulation." (Comment H, Section 821B, Restatement

(Second) of Torts (1979)). Thus, in the present case, if petitioners can demonstrate at trial strict compliance with all applicable statutes, regulations, and permits, the trier of fact will no doubt give considerable weight to this in determining whether petitioners' conduct constitutes a public nuisance.

However, it should also be noted that the language and legislative history of the Federal Water Pollution Control Act and amendments, as well as EPA's own regulations, make it clear that statutory compliance would not necessarily except a discharger from common law liability. Sections 505(e) and 510 of the Act establish that in addition to enforcing the terms of the Act, an interested party may seek to enforce more stringent remedies or standards than those provided by the statute. 33 U.S.A. §§1365(e), 1370. See also, 33 U.S.C. §1251(b) and §1371. With regard to the saving clause in the Federal Water Pollution Control Act Amendments of 1972, the Senate report stated:

> It should be noted . . . that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. *Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.* (Emphasis supplied.) S. Rep. No. 414, 92d Cong., First Sess. reported in 1972, U.S. Code Cong. & Ad. News 3668, 3746-47.

Finally, the Environmental Protection Agency has also stated that compliance with the terms of a permit does not "[a]uthorize any injury to private property or invasion of other private rights, or any infringement of federal, state, or local laws or regulations." 40 C.F.R. §122.11(d)(2).

Thus, it is clear that Congress expressly preserved common law rights in order to supplement the statutory scheme, and this Congressional intent has been

reaffirmed by the Environmental Protection Agency in its regulations. As previously noted, compliance with statutes and EPA regulations should be given considerable weight by the courts, but unless and until there is complete preemption of the environmental field by Congress, the federal common law will continue to be a necessary and effective supplement to the statutory and regulatory scheme.

POINT III

Neither the FWPCA Nor the MPRSA Has Preempted Relief Available to Respondents Pursuant to the Federal Common Law of Nuisance.

In their complaint, respondents sought relief pursuant to the federal common law of nuisance. The district court dismissed respondent's common law nuisance claim, holding that only governmental agencies can sue for relief under the federal common law of nuisance. The court of appeals reversed this holding of the district court and stated that the federal common law nuisance remedy recognized by this Court in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) is available in suits by private parties such as the respondents herein.

In Section II herein, respondents have presented arguments supporting the court of appeals' holding that relief pursuant to the federal common law of nuisance is available to private parties. Respondents shall, in this section, present their arguments for the proposition that neither the FWPCA nor the MPRSA has in any way preempted the federal common law of nuisance.

A. Where Congress Has Chosen to Preempt, It has Done So Expressly.

The non-federal petitioners have argued that the comprehensive regulatory schemes established by the

FWPCA and MPRSA clearly indicate Congressional intent to preempt the federal common law of nuisance. To the contrary, the statutes clearly indicate that where Congress has chosen to preempt, it has done so expressly.

The scope of preemption chosen by Congress in the area of ocean pollution is made clear by an analysis of the two statutes. For example, under the FWPCA, Congress has prohibited any state or political subdivision from adopting or enforcing any statute or regulation ". . . with respect to the design, manufacture, installation or use of any marine sanitation device on any vessel subject to the provisions of this section." 33 U.S.C. §1322(f)(1). In addition, the FWPCA also provides that neither a state, nor a political subdivision, nor interstate agency can either adopt or enforce any effluent limitation or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitations adopted pursuant to the statute. 33 U.S.C. §1370.

The scope of the preemption selected by Congress in the MPRSA is equally clear. Thus, the MPRSA prohibits any state from adopting or enforcing ". . . any rule or regulation relating to any activity regulated . . ." by this statute. 33 U.S.C. §1416(d).

It is clear, therefore, that when Congress has chosen to preempt activities relating to ocean pollution, it has done so expressly.

B. Both the Statutes and Legislative History Clearly Indicate That Congress Has Expressly Preserved the Availability of the Federal Common Law of Nuisance and Relief Thereunder.

An analysis of the statutes and their legislative history reveals the clear and unambiguous Congressional intent to specifically preserve rights and remedies available pursuant to the federal common law of nuisance.

Both the FWPCA and the MPRSA contain savings clauses specifically preserving a party's right under ". . . any statute *or common law* . . ." 33 U.S.C. §1365(e); 33 U.S.C. §1415(g)(5). As noted in Section II, the Senate Report concerning the Federal Water Pollution Control Act of 1972 provides:

> It should be noted . . . that the section would specifically preserve any rights, or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. *Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.* (Emphasis supplied.) S. Rep. No. 414, 92nd Cong., 1st Sess. Reported in 1972 U.S. Code Cong. Ad. News 3668, 3746-47.

The specified language of the statutes' savings clauses, including the specific reference to preserving rights and remedies under "*common law*" plainly indicates that Congress did not intend the federal environmental statutes to preempt the developing case law in the area of the federal common law of nuisance.

C. Preservation of the Federal Common Law of Nuisance Will Effectuate the Goals and Policies of the FWPCA and MPRSA.

Recognizing the unambiguous language of the statutes and their legislative history, petitioners are compelled to argue that the continued existence of the federal common law of nuisance would constitute an impediment to the implementation and enforcement of the statutes. The short answer, of course, is that Congress recognized the potential for conflict, but specifically preserved rights and remedies available under the federal common law of nuisance.

Moreover, petitioners' arguments fail to consider the fact that the statutes themselves envisage, and in-

deed encourage, a certain degree of conflict with respect to the effluent and other standards that a discharger, whether a governmental or private party, must satisfy. For example, even where the EPA has promulgated an effluent limitation or other limitation, effluent standard, prohibition, pretreatment standard or standard of performance, any state, political subdivision, or interstate agency is free to adopt a *more stringent* limitation or standard. 33 U.S.C. §1370. Moreover, should any more stringent standard or limitation be adopted, the statute specifically provides that any interested person may seek to enforce such a more stringent limitation or standard. 33 U.S.C. §1365(e).

It is especially significant to note that the EPA has argued for the continued existence of the federal common law of nuisance. See, e.g., *Reserve Mining Co. v. EPA*, 514 F.2d 492 (8th Cir. 1975). This certainly suggests that the preservation of the federal common law of nuisance will enhance rather than disrupt the goals and policies of the federal environmental statutes. Moreover, as the agency primarily responsible for administering and enforcing these Acts, the views of the EPA entitled to great weight. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976); *E. I. DuPont DeNemours & Co. v. Train*, 430 U.S. 112 (1977).

Certain of the petitioners have also suggested that the preservation of the federal common law of nuisance, and the resulting possibility of judgments for damages thereunder, will thwart the governmental planning and decision-making necessary to comply with these statutes. Once again, the short answer to this argument is that Congress has considered these possibilities, but has determined that the goals and policies of the statutes would be better advanced by the specific preservation of rights and remedies available pursuant to the federal common law. Moreover, the application of common law nuisance principles involves a balancing of many factors, and the federal courts are, therefore, fully equipped

to tailor the relief necessary, consistent with the circumstances and equities in any particular case. A federal court required to apply common law nuisance principles can well be expected to exercise the necessary degree of judicial restraint and to consider and reconcile the potentially conflicting demands in any particular case. In this regard, the counsel of the Chief Justice is especially appropriate:

> Our society and its governmental instrumentalities, having been less than alert to the needs of our environment for generations, have now taken protective steps. These developments, however praisworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of "environmental damage" is asserted . . . The decisional process for judges is one of balancing, and it is often a most difficult task. *Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures* (SCRAP), 409 U.S. 1207, 1217-1218 (1972).

CONCLUSION

For the reasons stated above, the decision of the court of appeals should be affirmed.

Respectfully submitted.

Robert P. Corbin
Philip A. Ryan
Edward C. German
Dean F. Murtagh
Attorneys for Respondents,
National Sea Clammers Association
and *Gosta Lovgren*

Of Counsel:
GERMAN, GALLAGHER & MURTAGH
Suite 3100
1818 Market Street
Philadelphia, PA 19103
(215) 563-1000

Nos. 79-1711; 79-1754; 79-1760; 80-12
(Consolidated)

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

CITY OF NEW YORK AND ABRAHAM BEAME,

Petitioners (79-1760),

-v.-

NATIONAL SEA CLAMMERS ASSOCIATION
AND GOSTA LOVRGEN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS CITY OF NEW YORK AND BEAME

ALLEN G. SCHWARTZ
Corporation Counsel
of the City of New York
Attorney for Petitioners
City of New York and
Beame
100 Church Street
New York, New York 10007
(212) 566-2091

LEONARD KOERNER,
STEPHEN P. KRAMER,
DAVID DREUDING,
of Counsel.

TABLE OF CONTENTS

Page

ARGUMENT

I. FEDERAL COMMON LAW IS NOT ANALOGOUS TO THE COMMON LAW APPLIES IN STATE COURTS, AS EACH HAS A DIFFERENT FUNCTION IN ITS RESPECTIVE LEGAL SYSTEM..... 1

II. THE INTERSTATE NATURE OF OCEAN POLLUTION DOES NOT REQUIRE A UNIFORM FEDERAL COMMON LAW RULE TO ADJUDICATE DISPUTES HEARD IN FEDERAL COURT..... 4

III. CONGRESSIONAL PREEMPTION OF FEDERAL COMMON LAW OUGHT TO BE MORE READILY FOUND THAN CONGRESSIONAL PREEMPTION OF STATE LAW. THERE IS NO REASON FOR FEDERAL COMMON LAW COURTS TO APPLY STANDARDS OF CONDUCT DIFFERENT FROM THE STANDARDS CONGRESS HAS DEEMED APPROPRIATE..... 5

Conclusion..... 9

CITATIONS

Cases:

	Page
Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).....	4
Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).....	3
Nader v. Allegheny Airlines, 426 U.S. 290 (1976).....	5, 6

Statutes:

Federal Water Pollution Control Act	
33 U.S.C. 1370	4

Miscellaneous:

Vining, Legal Identity (Yale Univ. Press 1978).....	6 - 7

ARGUMENT

I. FEDERAL COMMON LAW IS NOT ANALOGOUS TO THE COMMON LAW APPLIED IN STATE COURTS, AS EACH HAS A DIFFERENT FUNCTION IN ITS RESPECTIVE LEGAL SYSTEM.

Federal petitioners argue that since a federal common law of nuisance exists for suits brought by a state, "there is no reason to deny to a private party the right to invoke that law" (Federal brief, p. 33) in the same manner that private parties alleging special injury may invoke state common law to abate public nuisances. The fallacy in this argument lies in the misconception of the nature of federal common law. As we set forth in our main brief, the "common law" used to adjudicate disputes between states is not analogous to the common law applied in state courts to adjudicate disputes between private parties. The former is a species of inter-

national law, while the latter is an expression of the general sovereignty of the states to order the primary relations of their residents.

Private parties are not permitted to assert the claims of their sovereigns in disputes between states for the reason that private parties do not represent the interests of their sovereigns; it is a legal fiction in state common law actions that the private plaintiff represents the sovereign. The non-sovereign interests of private parties is highlighted in the case at hand by the presence of New Jersey citizens as plaintiffs and defendants. The sovereign interests of the State of New Jersey encompass the interests of all her citizens, including the New Jersey defendants in this action. The State of New Jersey does not need the aid of private

parties or the federal courts to protect its sovereign interests from invasion by New Jersey sewerage authorities.

Federal petitioners rely on Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938), for the proposition that a private party may invoke federal common law as a basis for a tort claim against a citizen of his own state or of another state when the tort occurs in interstate waters. Hinderlider stands only for the proposition that state law cannot grant private parties rights in interstate streams greater than the rights the state possesses itself under federal common law. While private parties may be bound by the precepts of federal common law, it does not follow from Hinderlider that private parties have standing to invoke it as the basis for a tort claim

under general federal question jurisdiction.

II. THE INTERSTATE NATURE OF OCEAN POLLUTION DOES NOT REQUIRE A UNIFORM FEDERAL COMMON LAW RULE TO ADJUDICATE DISPUTES HEARD IN FEDERAL COURT.

Neither the federal petitioners nor respondents have advanced any reason why a uniform federal common law should exist to govern behavior in cases involving interstate water pollution, but should not exist in other fields where interstate impacts are great, such as the common law duties of interstate rail carriers. Cf. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Indeed Congress has clearly expressed its intention, both in the savings clause of the FWPCA and in 33 U.S.C. 1370, not to require uniformity, but to allow staces to impose their own standards to accommodate peculiar local

conditions. The exceptions to the local option are narrow and specific.* In these circumstances, the need for a uniform body of federal tort law adverted to by federal petitioners does not seem compelling.

III. CONGRESSIONAL PREEMPTION OF FEDERAL COMMON LAW OUGHT TO BE MORE READILY FOUND THAN CONGRESSIONAL PREEMPTION OF STATE LAW. THERE IS NO REASON FOR FEDERAL COMMON LAW COURTS TO APPLY STANDARDS OF CONDUCT DIFFERENT FROM THE STANDARDS CONGRESS HAS DEEMED APPROPRIATE.

Federal petitioners rely on Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976), to support their contention that federal common law has not been preempted (Federal Amicus Curiae Brief in Illinois v. City of Milwaukee, No. 79-408, p. 20). But the constitutional policy at issue in

*See City's initial brief, p. 4, note 3; see also 33 U.S.C. 1416 (d).

Nader and related cases is primarily one of federalism; the constitutional issue involving congressional preemption of federal common law in the case at hand is one of separation of powers. Congress has created a complex regulatory scheme to govern discharges of pollution into the national waters, a scheme which allows for a far broader array of factors to be taken into account -- and a far greater expertise to be applied -- than that employed by courts in common law actions. The following comments, addressed to private rights of action in administrative law, are equally applicable to the suggested invocation of federal common law in the case at hand: where private rights of action are exercised,

> court, plaintiff and defendant have bypassed the administrative process and are in another world

> entirely, where there is no trial and error, no rule making cutting across the closed system of particular "cases", no accommodation, strategic delay, monitoring of consequences, reversal of direction, and reconsideration of positions. Court, plaintiff and defendant are in a world of rights and duties, discrete cases, correct and incorrect answers, res judicata, and irreversible consequences.

Vining, Legal Identity, 108.

Courts need not be hesitant in finding congressional preemption of federal common law when comprehensive regulatory programs administered by expert administrative agencies have been created. The statutory pollution limitations -- whether expressed in terms of a particular technology or in terms of the state and federal water quality standards which must not be violated -- represent the extent of the federal interest. The courts should defer to the congressional judgment as to the extent of the federal

interests. There is no reason why a federal common law court should apply a standard of conduct different from the statutory and regulatory standards that Congress has deemed be applied. The review mechanism of the Administrative Procedure Act, not common law collateral attacks on agency decisions, is the appropriate method for federal judicial involvement in issues involving federally regulated activities.

see 79 408

see 79

1754

see 79

1760

see 80 12